No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,
Appellees.

REPLY BRIEF FOR APPELLANTS.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Appellants.

J. J. DUNNE,
Of Counsel.

PERNAU-WALSH PRINTING CO.

Index to the Principal Matters Discussed in This Reply Brief.

No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,
Appellees.

REPLY BRIEF FOR APPELLANTS.

GENERAL FEATURES OF APPELLEE'S BRIEF.

No definitely reasoned theory of this cause can be extracted from the unsystematic, partisan and misleading brief filed herein on behalf of the appellee.

In our opening brief, we made an effort to be of some assistance to the court by endeavoring, in good faith, to reason out our objections to what we regard as prejudicial action by the learned judge below, and to enforce our reasoning by the citation of authorities which we deemed to be in point; we assumed, and still assume,

that this court will determine for itself, from the transcript of record, the character of this cause, irrespective of the assertions of counsel upon either side, however dogmatic; we believed, and we still believe, that this court, having determined independently the nature of this cause, will look into the briefs to ascertain what reasons are urged for the reversal of this decree, and what authorities are presented in support of such reasons; and it was in the sincere desire to be of some practical assistance to the court that we adopted the plan pursued in our opening brief. But, when considered from the standpoint of a real aid to the court, whether in the presentation of original reasoning, or of the results of research, the appellee's brief impresses us as being singularly deficient; it seeks to meet a conscientious attempt to discuss the vital issues in the cause by unsupported assertion; its attempted reproductions of the facts are garbled; it wastes useful space by multiplying citations upon inapplicable propositions; and instead of attempting to argue out, in a spirit of close adhesion to the actual disclosures of the record, the vital issues in the cause, it seeks to meet the contentions of the appellants by empty declamation, unsupported either by reason or by authority.

As we read the appellee's brief, we cannot resist the impression that he presents his case as if his mind were surcharged with a distinctly personal grievance; and since there is nothing in the nature of the questions presented here for investigation which can legitimately call for the very extreme and exaggerated declamations found in this brief, these appellants have the

right, we think, to ask what manner of cause it is which requires such sinister assistance, and to ask the court to measure the appellee's case, among other considerations, by the consideration that no case, strong enough to stand alone, needs to be eked out by inflammatory language; and to suggest that no additional presumption arises in favor of the cause of any litigant who resorts to exaggerated superlatives. One would suppose that it would be realized that dogmatic assertion is always feeble, and that a printed argument should go beyond mere declamatory asseveration and point out the connections and inter-relations of the facts, exhibiting their probative value and the inferences legitimately to be drawn from them. In the businesslike briefs of modern times it is evidence plus temperate speech rather than impassioned declamation which prevails; and vehemence, especially in arguments addressed to cool-brained judges, has grown to be quite out of place. The "sound and fury" order of argument is now rarely heard or attempted, and is accurately assessed; and the modern advocate deals in facts rather than in fancies, and in figures of arithmetic rather than in figures of speech.

A statement is not any stronger because an advocate vehemently protests that it is true, nor is an argument made more favorable by mere declarations that it is conclusive. Assertion is not proof, nor is affirmation argument; he who advances an argument and straightway proclaims its conclusiveness, invites suspicion, and, like the player Queen in Hamlet, he "doth protest too much"; and his overmuch protestation recalls the individual who ran about the streets crying, "Lo! I am

an honest man". Unsupported assertions, however positively made, are but empty things, carrying neither weight nor conviction; and it is folly to imagine that a contention can be strengthened by vociferous overstatement. Exaggeration in any form is an indication of weakness; but no form of exaggeration is more vicious than that in which propositions, whether of law or of fact, are hurled at a judge as if he were being challenged or defied to dispute them. We do not require that Mr. Justice Story should tell us that:

> "Loose declamation may deceive a crowd
> "And seem more striking as it grows more loud."

We know, indeed, that the advocate whose statements are extreme and declamatory is forever crucifying trifles; his conceptions of his case are always disproportioned; when such a man praises, it is like the praise of a circus poster; when he blames it is like the blow of a battle axe; neither restraint nor conservatism is for him; he argues his case with a curl of the lip, with a tongue that is of studied purpose sword-like, and with a mind of iconoclastic discernment; he is a victim of professional dyspepsia.

According to the mental attitude revealed in this brief, no man who has understanding sufficient to carry him through the first proposition of Euclid can read this masterpiece of demonstration and honestly declare that he remains unconvinced; but we have formed a very different opinion; we think that our opponent's theory rests altogether upon misapprehended facts and false principles; and that even upon those misapprehended facts and false principles he does not reason logically.

One finds, indeed, certain sheets of paper covered with words taken from the English Dictionary, but beyond that, nothing. The great mass of the brief is quite without definite meaning, and an energetic intellectual effort to grapple with it at once discloses its inconclusiveness, inaccuracy and emptiness. It seems impossible to extract from this brief distinct propositions supported by specific facts; and a survey of the brief as a whole convinces us that, without adducing a solitary real fact with any approach to accuracy, and without even taking the trouble to perplex the issues by a single plausible sophism, this appellee would placidly dogmatize away the interests of the one man who saved from ruin an enterprise that those who now criticize him, and those they obtained their stock from without the payment of a penny and as part of a scheme to avoid corporate liability, would not stir a finger to save. The author of this brief seems to be carried away by the desire to "control the management". He seems to profess the belief that a farmer upon shares would be an ideal manager of a mine of the characteristics and environment of this; while he enjoys a particularly copious and fluent imagination, yet he seems wholly bereft of that clarity of vision which would have enabled him to distinguish in this record between what he might sanely believe, and what he would like to believe. Great works in fiction are the arduous victories of great minds over great imaginations; but here we are confronted with the commonplace victory of a profuse imagination over an imperfectly attentive mentality.

At various places in this brief, the author has indulged in a style of statement which we understand to be

entirely unauthorized and improper; the effort is made to bolster up the case of the appellee by the expression of personal opinions, by declaring what the author's own thought and own belief are as to this case; and the author is very emphatic in his assertions and very loud in his pledges. But, as we understand the rule of professional ethics, it is not proper for counsel to endeavor to assist his client's cause by a personal pledge of his belief in the honesty of the plaintiff or in the dishonesty of the defendants; that, we submit, is no part of a lawyer's duty. Is this case, we ask, to be tried upon the mere assertions of counsel, counsel for the appellee asseverating with all the power of dogmatism his view and his belief, and counsel for appellants meeting that by equally positive statements of their individual opinion and their belief? Counsel are here, we think, to collate the testimony, to present the law, to discuss the case, but not to express their individual opinion or their personal belief; and we consider that we properly fulfill our duty by discussing the law and the evidence, without any expression of our individual opinions or beliefs, and by asking this court to deduce from that law and evidence a fair and just conclusion. That, we understand to be our province and our duty, and the boundary of the province and duty of every advocate that appears in a court of justice; but since the brief for the appellee, in more than one place, has sinned in this regard, we are therefore constrained to remind the court that this cause is to be determined, not upon the statements of counsel, but upon the evidence in the record.

A general survey of this brief discloses unwarranted assumptions, extravagant epithets, false promises, fallacious reasons, new ways to pay old legal debts, misapprehension of *Cowell v. McMillin,* separation of witnesses into two classes, with all the angels upon the side of the appellee, and all the demons on the side of the appellants, crass ambiguities in the use of legal terminology, wilful misleading, the mobilization of straw men, and plain misstatements of the testimony; and out of this complex the only statement which we have been able to discover which even indirectly would give the appellants credit for anything is the declaration upon the first page wherein it is stated that our general statement of the litigation is controverted because, if you please, of its argumentative and prolix character, but not, be it observed, because of any inaccuracy or of any attempt at misleading.

We have said that this brief includes unwarranted assumptions; and an illustration of that may be found, for example, upon page 49, where the assumption is made that Mr. Noyes "took wrongful advantage of his confidential relation with the company", and that "in practical effect the company funds were used to pay for the property". We think it would be very much more to the point if, instead of making unwarranted assumptions, of which these are but random samples, this appellee had devoted his energies to the establishment of a confidential agency between Mr. Noyes and the Presidio Mining Company as to Section 5, the tract of land in dispute; and that it would very much enhance the utility of his brief if some faint attempt at

least had been made to trace company funds into the purchase price of Section 5. We venture the statement that nowhere throughout this record can be found any evidence, oral or documentary, constituting an authority or direction from the Presidio Mining Company to William S. Noyes to act as its agent in respect to Section 5, nor can any evidence be found, either oral or documentary, which successfully traces into the purchase of Section 5 any of the funds of the company.

We have said that this brief indulges in extravagent epithets; and an illustration of this can be found on page 111, where we encounter such exaggerated declamations as "a most shocking case of fraud", "such glaring fraud", and "gigantic fraud"; and also for another example, upon page 118, where Osborn is referred to as a "thief", Peat as a "dummy", and B. S. Noyes as the confessed errand boy of William S. Noyes, and chief assistant in concealing the Osborn shortages, and Miss Doherty as an echo and a pliant tool. As we have already pointed out, inflamatory language of this character raises no additional presumption in favor of this appellee; to shriek fraud is not to establish fraud—the question is not one of lung power; and this futile and vociferous tirade, displaying more egoistic passion than altruistic wisdom, is quite upon a par with the bewildering confusion manifested generally throughout this brief. We submit that no one may justly call Mr. Noyes or the others evil names unless he is prepared to make those names harmonize with the wonderful success of Noyes and the others in accomplishing the rehabilitation of this company; and the grosser the

names that these people are called, the more difficult becomes this appellee's real task of solving the problem of explaining how it was that these people accomplished so much, and how it was that their work lasted so long. We submit that it is not open to any appellee to fling charges, and then to leave unexplained the problems they create. Of course, if the object of this appellee is to dress up this history to look like a shilling shocker, he may do that with impunity so far as our prohibitive power is concerned; but in that event, we submit that he can make no appeal except to an audience which has never realized either that there are two sides to this history, or that, in fact, the appellee's history never happened at all. The events described in the shilling shocker never happened, and there is therefore no necessity to explain them; but the events recorded in this history did take place, and it is the business of this appellee to make them intelligible upon some theory calculated to prosper his contention—if he can.

We have said that in this brief may be found fallacious reasoning; probably, our reference in this regard was too favorable to the appellee; and this would seem to be so if the suggestion at the bottom of page 139, for example, be taken into the account. There, reference is made to the payment made to Mr. Bowers on October 1, 1913; and in that connection it is characteristically said that this payment *"it is asserted"* was made in a certain way. We describe this statement, that "it is asserted" that the payment was made in a certain way, as characteristic, because similar distortions of the rec-

ord are frequent in this brief, as any careful reader will observe, and will be referred to from time to time as this reply proceeds. In this particular instance, the statement is made that "it is asserted" that the Bowers payment was made in a particular way; we deny flatly the verity of this declaration; and we insist that instead of the manner in which this Bowers payment was made being a mere "assertion", it was a plainly and unequivocally conceded fact in the case. Mr. Noyes testified without contradiction that he drew $6000 of the Bowers payment from the Banking House of Herzog & Glazier in New York, through J. Barth & Company, of San Francisco; that he had a current account in New York several years old; that he had continuously from the first of January, 1913, up to the time he drew that $6000, as much as $6000 on deposit with that firm, and a great deal more, not always in cash, but part of the time in stocks that he had bought and speculated in (694-5); and he testified, and likewise without contradiction, that the balance of the Bowers payment was made by his check from his bank account here (684); and later, when the telegraphic transfer from Herzog & Glazier was referred to, and the $6000 Barth check, endorsed for account of the U. S. National Bank, of Ashland, Oregon, Mr. Bowers' home town, was produced, and when it was offered to bring a witness from J. Barth & Company to show the transaction, the concession was made by the present appellee that *"we do not question this transaction"* (700-1); and yet, in the face of the plain concession, the declaration is made in this brief that "it is asserted" that the pay-

ment to Mr. Bowers, was made in this particular way; and while this is but one instance out of many wherein a false color is sought to be thrown over the disclosures of this record, nevertheless, it is valuable as a warning and as illustrative of the extreme danger of taking the declarations of this brief at their face value. It is in this connection that a flight of sheer imagination is indulged with reference to this sum of $6000, and it is declared that the circumstance that Mr. Noyes should have $6000 in New York to draw on is no "indication" that he did not deposit in New York some of the very moneys paid him from the company here; there is, however, in this record no evidence that this appellee can lay his finger upon—and we challenge him to name volume and page, if there be—which gives the faintest color to this piece of guesswork. What, indeed, is the name of the witness who has testified to any fact in support of this statement? What is the number of the exhibit in this cause which justifies this flight of fancy? And when Mr. Noyes was testifying to the circumstances of this Bowers payment, when the Barth check was produced, and when the offer was made to produce a witness from the Barth Company to verify the transaction, why did not this appellee, instead of declaring "we do not question this transaction", produce a single fact or a single document to furnish a foundation for the fallacious attempt at reasoning here presented? If imaginings of this character are to be substituted for the plain facts contained in the record, our conceptions of the functions of an appellate court must undergo revision.

We have said that this brief indicates a new way to pay off old legal debts; and in saying that, we had in mind the attitude of the appellee in relation to the tracing of company funds into the purchase price of Section 5. In our opening brief, we endeavored to collate the facts and present the law upon that aspect of the case; we marshalled the facts, and we collected and cited the germane authorities; we referred to the authoritative rulings of the Supreme Court of the United States and of this court in support of our position that the burden of proving that company funds went into the purchase of Section 5 rested upon this appellee and that all doubts in connection therewith should be resolved against him; and we venture the opinion that we demonstrated that upon these vital propositions the complainant's case broke down. In view of all this, would not one expect some sort of a reasoned reply? If we misstated the facts, or if we misapprehended the law, should not some attempt have been made to set right the facts and to clarify the law? If our reasoning were fallacious, would not some attempt have been made to expose and defeat the fallacy? And yet, what reply is made to our views upon this topic? Will it be believed that all that we are confronted with are a few scattered generalities unworthy of description as coherent reasoning? Will it be believed that our views as to the facts are left practically untouched? And who, that does not see it with his own eyes on page 141 of appellee's brief would believe that our views as to the law bearing upon this topic have been met by the following crushing answer, "we do not so construe the law", and nothing more?

Could anything be more simple or more convenient than to brush aside unpleasant authorities by the bald declaration "we do not so construe the law"?

We have said that this brief misapprehends the case of *Cowell v. McMillin;* and in support of that statement we urge an analytical comparison between the case itself upon the one side and the references to the case contained in the briefs on file herein, our own as well as our opponents; and we cannot resist the feeling that should such a comparison be instituted, we should have nothing to fear from the result. But in passing, and as throwing further light upon the evident misapprehension of this cause by the appellee, we call attention to the bottom of page 165, and the top of page 166 of appellee's brief, where sundry authorities are cited as if they supported the proposition, "the facts heretofore stated constitute actual fraud", and where, after having cited those authorities, the statement is made, "cited in *Cowell v. McMillin,* 177 Fed. 43". Here, again, we encounter another of those instances wherein declarations made in appellee's brief cannot, with any degree of safety, be accepted at their face value. What, we may ask, would be the natural mental movement of the reader of appellee's brief, to whom *Cowell v. McMillin* was inaccessible? It seems to us that such an inquirer would at least assume that the authorities cited at the bottom of page 165 and at the top of page 166 of appellee's brief were "cited in *Cowell v. McMillin,* 177 Fed. 483" as determinative of that litigation; when we are told that certain authorities are cited in a decision, we naturally assume that such au-

thorities were cited in justification of the conclusion reached; if, upon the other hand, authorities are distinguished in an opinion, no one regards them as being the authorities upon which the courts rests its conclusion; and therefore to suggest that certain authorities are "cited" in an opinion, when in fact they are distinguished away, is to imply that which is not founded in verity. This, however, is precisely the situation which presents itself in appellee's present reference to *Cowell v. McMillin;* so far from the authorities referred to at the place mentioned in appellee's brief furnishing the foundation of the decision in that case, each and all of them were distinguished away by the court and in terms described as having no applicability to the issues there presented.

Another illustration of the general characteristics of this brief may be found in its treatment of the various witnesses who appeared at the hearing below. Here, again, we encounter the views of the extremist; every witness who was called by the appellee immediately became sanctified and invested with a halo; every witness who testified for the defendants became promptly enrolled in the battalion of demons; and it seems to have made no sort of difference what these witnesses actually testified to or to what extent their statements were confirmed or opposed by the documents in the case. That portion of the appellee's brief included between pages 187 and 195 presents the crudest of all forms of classification of witnesses; and instead of a rational analysis of the testimony of the witnesses, all possible virtues are attributed to those upon one

side, and all possible vices to those upon the other side. Surely, this method of treatment cannot appeal to any impartial investigator.

We said above that this brief dealt in ambiguous statements; and in support of that, we call attention, for example, to page 127, and again to page 143, where it is stated that Mr. Noyes was "the confidential agent". If any inquiry should be made into the details of this alleged confidential agency, having Section 5 in mind, no adequate reply can be extracted from this brief; if it be asked, "confidential agent as to what?", the answer is not forthcoming; but, as we think we established in our opening brief, unless Mr. Noyes was the confidential agent of the Presidio Mining Company as to the acquisition of Section 5, it is of no judicial consequence in what other direction, if in any, he occupied the relationship of confidential agent. And since this record fails to disclose, from beginning to end, the conferring upon Mr. Noyes by the Presidio Mining Company of any authority to acquire Section 5 for it, but the contrary, we feel that we are authorized in calling attention to the ambiguity lurking in the phrase "confidential agent". And in this connection, and as further illustrating the danger of accepting at their face value the statements contained in this brief, we call attention to the declaration made at page 144, where it is stated that "Mr. Noyes obtained Section 5 ostensibly for the company, as he himself, his brother, and Miss Doherty testified". We are compelled to say that we regard this statement as a plain perversion of the facts detailed in the record. The pleadings of the complainant himself, as shown in the opening brief,

make it clear, beyond all doubt, that he understood that Mr. Noyes acquired Section 5 in his individual right, and not for this company, whether ostensibly, or otherwise; repeatedly, in the pleadings of this appellee, may the statement be found that Mr. Noyes (not the company at all), was the owner of Section 5; and the whole theory which permeates the appellee's pleadings is that while Mr. Noyes acquired Section 5 individually, yet he acquired it under such circumstances and conditions that he should be charged therewith as a trustee for the company. When we turn to the testimony, we find no evidence on behalf of the appellee which shows that Mr. Noyes acquired this section "ostensibly for the company"; and when we turn to the testimony of Mr. Noyes himself, his brother and Miss Doherty, we observe how Mr. Noyes originally brought this section to the attention of the principal stockholders of the company, urged its acquisition upon them, and when they refused to move in that matter, he acquired the section for himself in his individual right. And the testimony further shows that immediately upon acquiring it, he issued to each of the stockholders, including this very appellee, the annual report of 1913, wherein his individual ownership is openly declared, and wherein he takes a position entirely at war with the existence of any trust in that section in favor of this company. There can be no qualification of these facts; and when they are viewed with any degree of sanity, the claim that Mr. Noyes acquired Section 5, "ostensibly for the company" is seen to be a claim unworthy of serious consideration.

We have said above that among the general features of this brief was that of wilful misleading; and in support of this statement we wish to call attention to at least one illustration,—an illustration of such a character as to repel the thought that the statement which we complain about was accidental. On page 150 of this brief, *ad finem,* the statement is actually made that "there is no documentary proof adduced by the defendants showing the ownership or transfer to Noyes of said stock",—referring to the Osborn stock; and following this and as a corollary thereof, it is urged on page 151 that therefore "the fact is, he (Mr. Noyes) never was the owner of one-half of Osborn's stock". Upon what principle, consistent with common fairness and sincerity, can considerations of this character be addressed to this court? The implication is that there is no documentary proof establishing either the ownership by Mr. Noyes of the Osborn stock, or the transfer to him of that stock; and since that implication is sought to be urged upon this court by this appellee, when this appellee himself was the very person who not only asserts these things in his pleadings, but also produces that precise documentary proof, what sort of opinion can any fair man have of the reliability of any argument presented in this brief? And yet, the fact is that the documentary proof establishing the ownership of this stock in Mr. Noyes, and the transfer of this stock to Mr. Noyes, was produced by this very appellee himself. At page 505 of the record, the appellee produces certain pages of the stock journal "showing the transfers of stock"; "this exhibit presents the page just exactly as it is"; "that gives the entire history

practically of certain stock transactions in this case''; and on page 506, the transcript of the stock journal, this appellee's exhibit, is set forth, exhibiting the ownership of the stock mentioned by Mr. Noyes, and the transfer of that stock to him. Where a fact is proven by one's opponent, where that fact becomes an accepted fact in a cause, where it is eliminated from the region of controversy, and that, too, through the instrumentality of one's opponent, with what sort of good faith can that opponent, after one has accepted and relied upon the fact, turn about and charge that there is no proof of the very fact which he himself has established in the case? Do methods like these commend the case in aid of which they are employed? Or, by such methods, may not one say that ''any suit is discredited'' *(Wall v. Anaconda M. Co.*, 216 Fed. 242, 245; affirmed *sub nominee Wall v. Parrott Copper M. Co.*, 244 U. S. 407)?

Up and down through this brief sundry straw men gaily march (compare 156-7, 228), but their evolutions are not of interest, if the main ideas of our opening brief be correct; and as frequently occurs, apprehensions are conjured up as to what might or might not be done, or what might or might not happen, in certain imagined predicaments. But we submit that no extreme statement, no hypothetical conjecturality is welcome in a legal discussion. It is to be regarded, we think, that this method of argumentation is only too familiar; it is not by any means an uncommon thing for appellee to slip the leash from a riotous imagination, conjure up some extreme case, or some extreme phase

of a case not actually visible in the pending situation, some harrowing possibility, and then propound intricate conundrums based upon such extreme imaginings to an astonished court; this sort of thing is quite facile of accomplishment, but does not commend itself to practical judges. Something of this sentiment inspired the observations of Mr. Justice Barnes, when he remarked:

> "In construing a statute it is hardly fair to begin by conjuring up a lot of ghosts or by setting up straw men so as to indulge in the pleasure of knocking them down. When we let loose our imaginative powers, there is hardly any limit to the heights to which we may soar or to the depths to which we may descend. We can imagine that Roosevelt will insist that Taft is the logical candidate for president at the next election, or vice versa; or that the English Parliament will soon pass a vote of confidence in the Kaiser or in G. Bernard Shaw, or that the English and German governments will agree on who was responsible for starting the war, or that the present war will be the last one; or even that a constitutional government will be established in Mexico within the next half a century. But a statute should not be compelled to run the gauntlet of any such far-fetched possibilities."
>
> *Husting v. Board of State Canvassers,* 159 Wis. 244.

And when this procedure was recently attempted before the Supreme Court, that learned body brushed aside the attempt with the remark "we are not now concerned with the extreme cases which are hypothetically presented" *(Atl. Trans. Co. v. Inbroveck,* 234 U. S. 52, 61). And we respectfully urge that any attempt in this cause to import into it these imaginary possibilities should likewise be frowned upon.

Without pursuing this topic further, attention may at least be called to one further general feature of this

brief, which, again, supports our suggestion that the declarations of this brief are not to be taken at their face value, and are misleading in the extreme. The illustration to which we refer will be found on page 136 of this brief, and we here quote the passage in question:

> "We have here a conflict of testimony. William S. Noyes, B. S. Noyes and Miss Doherty all say that William S. Noyes offered the property (Section 5) to the company to be taken by it at any time the company saw fit to do so, at its purchase price to him. As to his offering the property to the company, two of the defendants, Peat and Osborn, stated to Capt. Overton that they knew nothing about an offer to the company, or when it was offered, if at all."

This is what we feel justified in describing as a characteristic passage in this brief; and for more than one reason, a man should no more be proud of refuting it than of having two legs. Without seeking to put the desire to state facts correctly upon any particularly high plane of professional morality, but looking at the matter from a purely utilitarian point of view, one would suppose that the only course open to the litigant is to endeavor to the best of his ability to state the facts correctly, and that the commonest kind of common fairness both to one's antagonist and to the court requires that the facts should be fairly stated; and in view of this, it is extremely difficult to find any rational explanation for the position taken in the passage just quoted. In the first place, the reproduction of the alleged disclosures of Peat and Osborn to Overton is in itself a most indefensible departure from the record. The brief declares in plain terms that they

"stated to Capt. Overton that they knew nothing about an offer to the company"; and yet, when we turn to the testimony of Overton, we find nothing of that kind stated by him, nor anything approaching anything of that kind; on the contrary, it appears affirmatively that in his conferences with Osborn and Peat, the offer of Section 5 to the company was taken for granted by all concerned, and that the only feature of the matter that, according to Overton, was any way uncertain, was the date when the conceded offer was made, and the sum for which the section was offered to the company. The following is the testimony of Overton upon this subject-matter; and we respectfully insist that there is nothing whatever in this excerpt to justify the statement that Messrs. Peat and Osborn stated to Capt. Overton that they knew nothing about an offer to the company:

> "I tried to find out from Mr. Osborn how much Section 5 had been offered to the Presidio Mining Company for, and when. I told him I could find no records for that, he told me he did not know when the offer was made, or for how much, I would have to see Mr. Noyes about that.
>
> Mr. HARDING. I ask that that be stricken out.
>
> The COURT. Motion denied.
>
> The WITNESS (continuing). Mr. Osborn said that there was no record in the office, but there probably might be some memorandum in Mr. Noyes' office, about his offer of Section 5 to the Presidio Mining Company. I did not go to see Mr. Noyes. I told him that Mr. Noyes could see me in the Presidio Mining Company's office, but I did not care to go to Mr. Noyes' office. Mr. Osborn was the only one of the defendants who threatened me. Mr. Peat had conversation with me relative to these matters, and told me he did not know when Section 5 was offered to the Presidio Mining Company, nor for how much. I could not find out. I was trying to find out how much Section 5 had cost, and could not find out from either Mr. Osborn or

> Mr. Peat. Mr. Osborn told me that there was no record of that unless it might be a memorandum in Mr. Noyes' own office. I looked over the records thoroughly; I did not find anything. I found nothing in the minutes at all, where it says how much it was offered for, or where it was offered; it simply says in the minutes of November 19th, that it had been offered, but there is no record where that is found'' (Transcript of Record, pages 586-7).

Nor is this all, in connection with the passage above quoted from appellee's brief. Not only does the passage in question seek to leave a false impression with reference to this offer of Section 5 to the company, but it is a verification of the statement which we made at the opening of this reply brief to the effect that not only were the appellee's principles false, but even upon those false principles he was unable to reason logically. In the passage in question we are told that ''we have here a conflict of testimony''; and what is the ''conflict of testimony''? The obvious effort is to discount the thought that Section 5 was offered by Mr. Noyes to the company; the appellee clearly appreciated the importance of that action on the part of Mr. Noyes; and the passage in question shows he does not hesitate to descend to misrepresentation in his effort to force that idea into the minds of this court. Where, then, is the ''conflict of testimony'' upon this important point? It appears from the passage quoted that while, upon the one side, there is concurrent testimony of three witnesses to a given fact, on the other side there is the unsupported (but as we have seen untrue) testimony attributed to two other witnesses that they ''*knew nothing* about an offer to the company''; where is the ''conflict of testimony'' here? If three witnesses testify

that at the time when a shot was fired a man wearing a brown hat stood on the corner of the street, and two witnesses declared that "they knew nothing" concerning that subject-matter, where is the "conflict of testimony"? How can he who "knew nothing" about a fact be said to be in conflict with those who testify directly, positively, clearly and unmistakably to that fact? Where affirmative knowledge upon the one side is confronted by alleged ignorance upon the other side, is there any "conflict of testimony"? It seems idle to analyze this thing; and were it not that we are anxious that the declarations in this brief, of which this is but an exemplar, should not be taken at their face value, we should pass by this passage with the silence that it deserves.

THE BURDEN OF PROOF.

Not only does the burden of proof rest upon the accuser, but before one can be called upon to explain a transaction, or its fairness, such a transaction must be established as required an explanation either of itself or of its fairness.

The claim is made in the appellee's brief that the directors of the defendant company, because dominated by William S. Noyes, must show their acts and transactions to be fair; and it is asserted that this rule particularly applies to Mr. Noyes because he contracted with himself while in an official position and in a fiduciary relation. This claim, however, begs the question in the case; it calmly assumes the very matters in issue. We deny that these directors were "dominated" by Mr. Noyes; we deny that Mr. Noyes "contracted with himself while in an official position and in a fiduciary relation",

or contracted with himself otherwise; and we insist that some rational foundation be laid, some rational proof be made, of these propositions, before any duty to explain fairness (assuming that there was any such necessity) can be impressed upon any of these defendants. The cases cited by the appellee all presuppose the precise matters which are in controversy in this cause; we have no difficulty in conceding that, in a proper case, and where a proper foundation for the claim shall first have been duly laid, a duty to show fairness may arise; but we insist that in the cause at bar we are not confronted with such a case. What, indeed, was the transaction which calls for its justification by its fairness? What acts had William S. Noyes done that he should show the fairness of those acts, at the behest of a single stockholder in this company? What duty owed by Mr. Noyes to this company as to Section 5 had he breached, that he should show the fairness of his acts in connection therewith? What duty to the Presidio Mining Company was Mr. Noyes under, all of the facts considered, which would be inconsistent with the character of purchaser on his own account of Section 5? When it is said that a man must show fairness, the obvious assumption is that some act of his was or is of a character which calls for the proof of fairness; what, then, was that act? And upon whom rests the duty of establishing such act? Clearly, the act in question was not the mere circumstance of the purchase of Section 5; no law prohibits an employee of a corporation from purchasing a piece of real property; other and additional features giving a special aspect to the transaction, must be established, and established by

the actor in the litigation; what were they? Did Mr. Noyes frustrate any of the plans of this company with reference to Section 5? We know that this company had no plans with reference to that section. Did Mr. Noyes make a secret, hidden purchase of Section 5 with knowledge of any plans of this company which involved that section? We know that the purchase was not secret, that it was made pursuant to an antecedent declaration of intention (682-3, 813-4, 817), that it was made perfectly openly, that the fact that it was to be made was thoroughly well known to the principal stockholders of the company, that when it was made the facts in connection with the transaction were published to every stockholder in the company, and that the purchase was not made with knowledge of any plans of the company involving the section in question, for the sufficient reason that the company had no such plans. When the purchase was made, was Mr. Noyes then the agent of this company for that purpose? We know that he was not, that he never was deputed by the company to transact any such business, that during the long years of this company's corporate history it had never manifested the slightest intention to acquire the section, and that it never appointed Mr. Noyes, expressly or otherwise, as its agent to acquire this specific tract of land. Was the section purchased by the use of company funds? We know the desperate financial condition of this company at the time of this purchase, that it was wholly unable to make the purchase, that not only was its treasury depleted by the peculations of Osborn, but every dollar it had was swallowed up in the new cyanide plant which alone saved it from

ultimate destruction, and which was itself established upon credit secured by Mr. Noyes; and we know, further, that this appellee has wholly, completely and utterly failed to trace into the purchase of Section 5 one dollar of the funds of this company. Was this purchase made upon the company credit? We know that the leading banker of the vicinity—the only banker in the vicinity that the record advises us of—flatly declared that at the time of this purchase he would lend no money to this company without additional security, that the cyanide plant was installed upon credit, and that the Wells Fargo Nevada National Bank in San Francisco refused to loan to this company the money that it needed unless and until a personal and individual guaranty was given it. One might, indeed, go on thus enumerating features of this situation, not one of which has been established by this appellee; but until some such foundation is laid, no transaction is proved which calls for an explanation of its fairness. If, for example, it had been established that Mr. Noyes had actually been constituted the agent of this company for the specific purpose of acquiring Section 5, and thus charged with that specific duty, and that in violation of such duty he had surreptitiously acquired the section for himself with the purpose of thereafter disposing of it to the company at a greatly advanced figure, one could understand why he should be called upon to explain his conduct and to show its fairness. But we respectfully insist that until this foundation is laid the presumption must remain that, as the California Code of Evidence puts it, private transactions are fair and regular (C. C. P., 1963, sub. div. 19).

Nowhere does the appellee get away from the unfortunate circle in which he reasons. To establish a trust in Section 5, he must commence somewhere. Somewhere must he establish a fact from which a trust may be inferred. He may do that either by commencing with Section 5 and showing that the Presidio Mining Company had some right, title or interest therein, either vested or in expectancy; or, that Mr. Noyes was delegated by the company to acquire for it such right, title or interest. Having failed in that, the appellant is relegated to the other horn of the dilemma, namely, he must show that the fund with which Noyes purchased Section 5 was the money of the Presidio Mining Company. In this mode of attack, the appellee may proceed, if he can, to show that the money of the company was presently, at the very moment of the purchase, used by Mr. Noyes in the purchase. He would thus establish a resulting trust in Section 5. But this mode of attack was abandoned by appellant in his supplementary bill of complaint, and repudiated in his brief in this court (p. 129), and we are not concerned with this proposition.

It being conceded by appellee that Mr. Noyes in the first instance borrowed the money with which he purchased Section 5 from third persons, he must earmark any subsequent money received by Mr. Noyes from the company and trace it dollar by dollar and cent by cent into the repayment of Noyes' borrowed money. To do this, the appellee has made no effort, and concedes that he is making no effort to do this. Whether, therefore, appellee looks to the property for a foundation for a

trust, or whether he looks to the fund for the foundation of a trust, he finds himself at the end of the trail with the object of his quest not in hand.

So what does he do? He blandly assumes what the law compels him to prove, namely: that Mr. Noyes ultimately paid for Section 5 with moneys which he received from the company, and that, too, in the face of the uncontradicted and corroborated evidence of Mr. Noyes that he repaid these loans with money other than that received from the company. Appellee's position, stating it unduly sympathetically, is baldly this: because at some time subsequent to his purchase of Section 5, Mr. Noyes received funds from the company as his one-half of the net proceeds of the ore delivered from Section 5 to the company, therefore, the company paid for Section 5 and it is its property. The appellee does not perceive the breach in his argument, and again assumes a fact which he has not shown, namely: that the money so received by Noyes was wrongfully received. As we have said, ~~equity~~ equality is equity, and no fault can be found with the fact that the company divided half and half with Noyes the net profits of the ores mined from Section 5. So when appellee arrives at this arc in his psychological circle, he finds a break in it, which he can neither jump or span.

But had appellant traced these moneys so received by Mr. Noyes from the company into the purchase price of Section 5, dollar for dollar and cent for cent, it would avail him nothing. If the original purchase of Section 5 by Mr. Noyes was rightful, then

the payment of these moneys to Noyes was rightful and what he did with them is of no consequence.

If the original purchase by Noyes was rightful, there can be no trust. If the payment of the moneys by the company to Noyes was rightful, there can be no trust.

If both the original purchase and the payment of moneys were rightful, there can be no trust, and where does appellee show that either was wrongful? Can he be permitted to assume the precise foundation that he is called upon to establish by clear and convincing evidence?

FRAUD AND CONSTRUCTIVE TRUST.

Merely to argue that Mr. Noyes was, as superintendent of mining operations, under certain duties to this corporation, is to argue nothing: what is necessary to be established is that he was under a duty to this corporation as to the specific parcel of realty, Section 5; and whether Mr. Noyes was under any duty either to purchase Section 5 for the corporation, or to refrain from purchasing for himself, depends, inter alia, upon whether any fiduciary relation actually existed between him and the corporation quoad Section 5 itself, whether the corporation had any interest actual or in expectancy in that section, and whether the purchase of that section by Mr. Noyes hindered or frustated any plans of the corporation (if it had any plans in that regard) for developing the business for which it was created; none of these essentials, however, has been established here.

In our opening brief, at various places, we gave attention to this subject matter of fraud and constructive trust, especially at page 306, and following: but no practical attempt is made in the appellee's

brief to meet the views there formulated. At page 37 of the appellee's brief, and at pages 55 to 66 thereof, some generalities are set forth, but nothing which is applicable to the cause at bar, or which attempts to meet the questions here raised. Where, indeed, is the utility of citing such a case as *Dorsey Machine Co. v. McCaffrey* quoted from at page 37 of the appellee's brief, in a case of this kind? Did not Mr. Noyes express to the leading stockholders, in the fullest manner, his views concerning the acquisition of Section 5? Did he not urge upon them the proposition that this section should be acquired by the company? And when he obtained neither aid nor comfort from them in this matter did he not, openly, and in pursuance of his antecedently announced intention, purchase that section individually, and then expose all of the facts in connection therewith, including the agreement for the equal division of the net, to all of the stockholders, through the annual report of 1913, produced upon the trial below from the possession and custody of this appellee and filed in the cause as his exhibit 17? Where are, indeed, the affirmative acts of concealment in the cause at bar, of which so much is made in *Dorsey Machine Co. v. McCaffrey?* And, to take another hint from *Dorsey Machine Co. v. McCaffrey*: assuming (in the face of the Klink Bean report that "the arrangement has, on the whole, been a benefit to the company" (988)) that any of the acts or conduct of Mr. Noyes in connection with Section 5 has "injured" this appellee, let us observe that, to paraphrase *Dorsey Machine Co. v. McCaffrey,* the injured party has not remained in ignorance, without fault

or want of diligence on his part; on the contrary, from 1908, when he was given his stock in this company by a donor who desired to avoid corporate liability, to 1913, when he received the annual report of October 6th, he steadily slept upon any rights that he may have believed himself to have; and then, in 1913, when he received the annual report, which disclosed all the facts relative to Section 5, this active, enterprising, diligent, fully informed appellee simply rolled over in bed and continued the sleep which originated in 1908, and continued that sleep until July 26, 1915—is there here that ignorance, that absence of fault, that absence of the want of diligence which is referred to in *Dorsey Machine Co. v. McCaffrey?*

Between pages 55 and 66, certain elementary generalities are collected without anything to point their applicability to the cause at bar. Of what utility is it to announce to us that complainant's position is this or that or the other position; what is required is that the complainant should, not merely announce his position, but, by tangible and concrete evidence, make that announcement good; but here, the complainant breaks down. On page 58, for example, we are advised that "our position is that William S. Noyes was the confidential and trusted employee, agent and superintendent of the Presidio Mining Company, on whose shoulders rested the burden of conducting the company's affairs for a great many years prior to 1912". What does all this mean, having regard to the specific issues in this cause? Is there any proof in this cause that Mr. Noyes,

prior to the last days of January, 1913, held any other position in this company than that of superintendent? The actual mining operations aside, what agency does this record disclose to have been at any time entrusted to Mr. Noyes? Is there any pretense anywhere in this cause that he was appointed agent of the company for the purpose of purchasing Section 5? If any such evidence exists in this record we challenge its production; not the production of riotous imaginings, but of specific and immediate facts. At what meeting of this company was Mr. Noyes constituted such an agent? What was the date of the meeting? Who made the motion? What was the motion? What was the scope and what were the limitations of the asserted agency? What page of the minutes discloses the transaction? And in this very same passage the statement is made that the burden of conducting the company's affairs for a great many years prior to 1912, rested upon Mr. Noyes' shoulders: the mining operations aside, where is the proof of this? Was Boyd a nonentity? Did Mr. Noyes superintend the San Francisco bookkeeping also? What was the specific burden, actual mining operations aside, which rested upon Mr. Noyes' shoulders? We protest, and we protest again, against this method of making these extravagant assumptions without tangible facts to support them; and we invite a critical analysis of all such declarations wherever encountered in this brief.

In this portion of the brief, cases are cited which deal with the reposing of confidence by one person in another. When did the Presidio Mining Company ever repose any confidence in William S. Noyes as to the acquisition

of Section 5? When did the Presidio Mining Company ever entertain the intent to acquire that section? The low grade ores in Section 8, the high cost of reduction by the antiquated pan-amalgamation method, the absorption of its 1907-1912 earnings in the purchase of the internal combustion engine and indispensable repairs at Shafter, the imperious necessity of supplanting the pan-amalgamation method by the modern process of cyanidation, the peculations of Osborn, the meagre remnant of five or six thousand dollars that was swallowed up in the establishment of the cyanide plant, the significant necessity that this plant should have been established upon credits secured by Mr. Noyes, Mr. Noyes' own loan of $10,000 to this company, the refusal of the company's San Francisco bank to make required loans unless given the personal guaranty of members of the present administration, the declaration of the director of the Marfa National Bank that he would make no loans to this company without additional security,—all these features and others that might be added, demonstrate the grotesque absurdity of the thought that this company then possessed the financial ability to acquire Section 5, even if it entertained the intention of doing so; upon what basis, then, could it look forward to the acquisition of a tract of land which it was unable to purchase, or commission Mr. Noyes as its confidential agent to acquire that tract? And since when has the confidence referred to in the books become synonymous with unsympathetic frigidity? Did any of the leading stockholders of this company invest Mr. Noyes with their confidence by authorizing him to acquire this land for the company, or did they meet his suggestions in that

regard with coldness, aloofness and a refusal to co-operate or contribute? A fair analysis of the evidence disclosed in this record, will, we think, satisfy any open-minded investigator that so far from this confidence being an element in the relations between Mr. Noyes and the principal stockholders, it was conspicuous by its absence. No one can study, we submit, this record without perceiving that the attitude of these stockholders was not the attitude contemplated in the decisions to which we have referred; and it is clear, not only that Mr. Noyes was not their confidential agent, or the confidential agent of this company, in this matter of the acquisition of Section 5, but also that he was not an agent at all.

In the passages quoted from Bispham at the top of page 57, reference is made to two persons standing in a confidential relation "touching the subject matter as to which the fiduciary relation exists"; what evidence have we here of the existence of any fiduciary relation between this company or its stockholders and Mr. Noyes touching the subject matter of the acquisition of Section 5? In the passage quoted from the Taylor case, at the top of page 58, it is declared that there must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But what relation existed between Mr. Noyes and this company as to the acquisition of Section 5? When did Mr. Noyes fail to make a full discovery, both of his opinion that the section should be acquired by the company, and then upon meeting with a lack of confidence in that regard fail to disclose his antecedent

declaration of intention to acquire the section himself, and then, within a brief period after obtaining the deed to the property, fail to disclose to every stockholder of the company the entire situation? Is a project selfish wherein the primary effort of the advocate of the project was to benefit, not himself, but his company? Is a project selfish wherein a tract of land is acquired openly by an individual after his efforts to cause his company to acquire the same have met with failure?

In the passage quoted from Pomeroy, on page 61, and also quoted from Perry, on page 62, the general rule is referred to that where the legal title has been acquired through actual fraud, misrepresentation, concealment, or under other circumstances,

> "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest"

equity will act; but, what circumstances have been established in this cause to render it unconscientious for Mr. Noyes to retain and enjoy the beneficial interest in a tract of land which he had vainly endeavored to induce the company to purchase, which the company confessed its financial inability to purchase, which he purchased himself openly and publicly pursuant to an antecedently announced intention to do so, the purchase of which, and all the circumstances connected therewith, he published to every stockholder, and a tract of land concerning which he thereafter made with the Presidio Mining Company precisely the same sort of contract which this appellee employs in operating his own farms back East (608)? We respectfully submit that just conclusions upon this cause are not to be reached through subservience to generalities, disregarding the

actual facts themselves. We submit that by assiduously studying the history of this enterprise, by sifting the evidence of facts, by carefully combining and contrasting those facts which are authentic, by generalizing with judgment and diffidence, by perpetually bringing the theory that is in process of construction to the test of the relevant facts themselves, correcting or abandoning that theory accordingly as to the facts prove it to be partially or fundamentally unsound, and proceeding thus —patiently, diligently, candidly,—a conclusion can be reached which shall be just under the law to all concerned. But this consummation cannot be achieved by yielding to mere generalities.

In our opening brief, we argued that directors of a corporation are not held to supernatural diligence, that they are required to exercise that degree of diligence only which is employed by prudent men in their own affairs, that in this department of the law, as administered by modern courts, the ultimate test of the propriety of acts, conduct and contracts is their fairness, and that, taking together the history before us, and giving due weight to all of its retrospective, concomitant and prospectant features, no unfairness is discoverable; and we argued that the contract of November 19, 1913, in which the prior tentative arrangements had become merged, and which undertook definitively to establish the relations between the parties, was intrinsically a fair contract, that its fairness was supported by relevant, equitable considerations, and that a contract of this nature was sufficiently fair to be adopted by the appellee himself in the management of his farms back East (608); and so well recognized is this test of fair-

ness that even this appellee, extremist as he is, is unable to substitute for it any other more stringent or drastic test (see his brief, for example, at pages 68, 100, 142, 147). So well grounded, indeed is this test of fairness, that, in a case cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25, it was held that where a sale by directors of their own property to a corporation was open and fair, and at a reasonable market price, and the transaction was entered in the books and known to the stockholders, it is valid (*Figge v. Bergenthal,* 109 N. W. (Wis.) 581, 588); and in the same case, upon rehearing, it was held that an

> "officer of a corporation may sell to the latter so long as he acts openly and does no injury to the corporation and is within the scope of the corporate business of the corporation",

and it was further held that while transactions wherein the officer has a personal interest will be carefully scrutinized, yet,

> "the contract must stand or fall on the bona fides of it, and not on whether the corporation wins or loses by or because of good or bad business policy on the part of the officers of the corporation" (110 N. W. 798, 800), * * *

views which are recognized by the California cases also (*Herbert Kraft Co. v. Bryan,* 140 Cal. 73, 79; *Schnittger v. Old Home Mining Company,* 144 Id. 603; *California, etc. Land Co. v. Cuddeback,* 27 Cal. App. 450).

COMMENTARY ON FACTS.

References to the facts of this cause as contained in the appellee's brief fail to sustain the decree appealed from.

We regret to say that we are unable to discover any logical arrangement of topics in the appellee's brief;

we find it confused and inconsecutive; and if in the commentary which we are about to offer relative to the facts in the cause, as those facts are referred to in this brief, we shall ourselves be found to be more or less inconsecutive and desultory, we can only plead in extenuation that this is an unavoidable consequence of the characteristics of the brief under consideration. We shall endeavor, however, to collect together, as best we may, under appropriate headings, references which are scattered here and there throughout the appellee's brief; it is quite possible that we may overlook some of these references; but if so, the oversight will be quite unintentional.

PERSONALITY OF MARTIN AND OVERTON:

The purpose of this solitary complainant is to further his personal desires; Martin has never displayed any "active interest" in this corporation, its affairs or its litigation; and the present proceeding does not reflect the views or wishes of the stockholders generally.

In our opening brief, between pages 2 and 7, we endeavored to make clear the proposition that the present cause is essentially a "one man case" designed to further the personal desires of a single individual only, and that it does not reflect the views or wishes of the stockholders generally; and in that connection, we called attention to the individual activity of Overton, upon the one side, and, upon the other side, to the apathy and complete lack of interest, not only of Martin, but of all the other stockholders, whether minority or majority, so far as any expressed sympathy with the purposes of this suit was concerned; and we endeavored to emphasize the point by referring to the views of respectable

courts, both state and federal, bearing upon this point. In doing this, we have, as was our duty, confined ourselves to the record before us, upon which record, and upon which alone, we are bold enough to believe, this court will decide this cause These criticisms of ours have had the effect, however, of provoking from the appellee a panegyric of himself, of the silent Capt. Martin and of the father-in-law of the appellee; but that panegyric was based upon nothing which is contained in the record before us, so far as we are able to ascertain; on the contrary, there is here a very plain and equally flagrant departure from the record in the effort to attach to the persons referred to a factitious importance. The appellee is referred to on page 77 as "the principal complainant"; but the record in this cause disclosed no other real complainant, Martin being the veriest and merest figurehead, and no other stockholder, whether minority or majority, intervening in the cause in sympathy with the purposes of the bill. And in speaking of the appellee, reference is made to page 5 of the record, which not only deals with a matter of pleading rather than proof, but which is entirely silent as to the personality of the appellee; and the reference is further made to page 79 of the record, which likewise deals with a mere matter of pleading rather than proof and which is likewise entirely silent as to the personality of the appellee. It is alleged at pages 1 and 2, in the original bill of complaint that the appellee is a retired Captain of the United States Army, and that Captain Martin is a Captain of the United States Army at present on duty at Ft. Leavenworth, Kansas; but after this original bill of complaint became superseded and amended and sup-

plemental bills were filed in the cause, no allegations appeared therein to show that either the appellee or Captain Martin was an officer in the United States Army. Assuming, however, that in the pleadings upon which the cause was tried any statement was made that either the appellee or Captain Martin was an army officer, it is extremely difficult to understand, and we confess our total inability to understand, what that fact or circumstance would have to do with Boyd's conduct in transferring his stock to Osborn, or the conduct of Osborn in carrying out the wishes of Boyd by giving Mr. Noyes an interest in that stock, or with the acquisition of Section 5 by Mr. Noyes as developed in the transcript of record, or with any other material fact or circumstance in this controversy; whether the appellee or Captain Martin either was or is an army officer, can throw no light whatever upon the correct resolution of the issues in this cause, nor make Mr. Noyes a trustee if the facts do not demand that result; and this feature of the personality of the complainants, both real and nominal, as referred to in this appellee's brief, has in our opinion as much relevancy to the issues in this cause as the composition of the Amphictyonic Council which presided over the controversies of ancient Greece. It is in this connection that the statement is made relative to the "long and successful career of the appellee" and to the "many years in active service" attributed to Capt. Martin; and we here learn for the first time, and equally independently of the disclosures in the record, that "Captain Martin is now a Colonel"; but upon what authority these statements are made, we must confess our ignorance. We have been wholly unable to find

anything in this record to authorize these statements; we find nothing in them which replies to our strictures upon this cause as being a one man case; and we point to these departures from the record as but another instance of the truth of our criticism that the declarations of this brief are not to be taken by the court at their face value. So, on page 78, we find another statement equally without justification in this record, viz., that General Anson Mills was retired after "serving an honorable career over many, many years". A careful search of the record before us fails to reveal any authority for this statement; the statement in itself has no importance so far as any of the real issues in the cause are concerned; and it is a remark wholly outside the record and intended to attribute to the person in question a professed importance which the record in the cause does not attach to him.

In this connection, and as illustrative of the extreme danger of taking at their face value the declarations of the appellee's brief, we desire to call attention to a most extraordinary statement on page 77. It is there said that "the statements in the brief that he (Captain Martin) has never contributed anything to the expense of this case, nor lent his moral support is unqualifiedly false because Colonel Martin has done both"; and this statement is as wide of the record in this cause as its grammar is bad. We submit that no conscientious litigant would thus seek to impose upon this court a fact so flagrantly without support in this record; and we challenge this appellee to lay his finger upon the page of this record which shows either that Capt. Martin has

contributed a single penny to the expense of this cause, or has lent his moral support thereto. We challenge this appellee to lay his finger upon any page in this record which states that Capt. Martin "has done both". And we assert that the keenest examination of this record will demonstrate the utter absence of any evidence whatever establishing either of these asserted facts; and we insist that this is but another instance wherein direct statements are made in this brief without a particle of evidence in the record to justify them.

In view of what may hereafter be said, it seems not wholly irrelevant to refer to the statement on pages 94-5 of the appellee's brief, where an explanation is made of a statement in paragraph 16, not of the amended or supplemental bill upon which the case was tried, but of the original bill of complaint which was eliminated by Judge Dooling upon demurrer. There, the appellee referring to a document which had passed out of the case as a pleading, speaks of conferring with "the other complainants herein", followed, on page 95, by the bald and unwarranted assumption that certain persons there named were, in fact, "the other complainants herein", —an assumption demonstrated to be unwarranted by the circumstance that, aside from the present appellee, not a single other stockholder, whether minority or majority, has intervened in this cause in sympathy with the purposes of the bill. It is to be observed in this connection, moreover, that this passage in the original bill of complaint was deleted from the amended bill, but no notice of that circumstance is given on pages 94-5 of the appellee's brief. It is further of interest, at this juncture, to inquire who were these persons enumerated

on the top of page 95 of this brief, with whom, according to this original bill, the complainant Overton "conferred"; and when we turn to his testimony, at page 583, we find that after he had returned home to Maryland, "I wrote to members of my family who had large sums involved and proposed to raise a fund for an investigation"; were, then, the persons enumerated at the top of page 95, "members of my family", and did they accede to the appellee's proposal "to raise a fund for an investigation"? We know that they did not intervene in the cause—that they had not sufficient sympathy with the purposes of the bill to carry them that far; we know of no evidence whatever that they subscribed to "any fund for an investigation"; were these people, then, "members of my family"? The persons named are Kathleen C. Kline and Lelia Kline, General Anson Mills, Katie C. Stewart, Samuel Clary and Webster Thayer, Trustees, and William W. Smiley, Trustee. And in this connection it may be pointed out that while the Mills correspondence shows that Overton, Martin and Kathleen C. Kline received among them 16,000 shares of the Mills stock, leaving Mills with 1000 shares, yet there is nothing in the record which we have been able to discover which identifies any person as being among "members of my family" save and except Anson Mills himself, between whom and the appellee there is a relationship by marriage. So far as we are authorized by our researches to make the statement, we submit that the only possible inference deducible from this record is that the only discoverable "member of my family" is Anson Mills himself. So far, then, as any reasonable inference can be predicated upon the disclosures of the

record, Anson Mills is the person whom we must look to when references are made to "my family", or "our family". But, the statement is made at page 254 of the appellee's brief to the effect that the interests of the appellee "have cost appellee's family $60,000 of real money",—a statement which, we submit, is quite without a particle of competent evidence to sustain it. When we turn to something more specific and particular in this connection, and look at page 78 of the appellee's brief, we there discover that "it also appears in the record that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff paid $60,000 cash for their stock", citing page 579 of the record in support of this statement. But the first observation which we desire to make concerning this declaration is that there is no proof in this record which we have been able anywhere to discover showing that "Colonel Carl A. Martin, the Kline family and Orndorff" are, even by marriage, members of "General Mills' family"; and until we are satisfied by competent evidence of the verity of this fact, we shall continue to be guided by the well settled maxim *quod non apparet, non est.* In a word, the statement that "Colonel Carl A. Martin, the Kline family and Orndorff" are included in "General Mills' family" is a statement wholly unsupported by a scrap of evidence in this record. There is evidence that Captain Overton is connected by marriage with General Mills; but beyond that, the evidence does not go, so far as we are able to discover. And in the next place, we find no evidence whatever that these people just mentioned "paid $60,000 for their stock", or any other sum. So far as "Captain Overton, Colonel

Carl A. Martin, the Kline family and Orndorff'' are concerned, we know that they were given their stock by General Mills, and there is no proof that any one of them ever paid a single dollar for a single share of the stock given them by General Mills. So far as the person described as ''Orndorff'' is concerned, the record is entirely silent as to when, where, how, or for what consideration that person acquired any of the stock of the Presidio Mining Company; certainly, there is no proof that that person paid $60,000 or any other sum whatever for the stock standing in that person's name. And when we turn to page 579 of the record cited in support of the statement just criticised, we there find the following bald conclusion by the witness Overton upon this subject: ''the amount of invested capital that my family and connections have put into the Presidio Mining Company as an investment is in the neighborhood of $60,000''. Apart from the delightful indefiniteness of the expression ''in the neighborhood of $60,000'' we wish to point out that what is here stated was not, so far as we can gather from the record before us, a fact within the knowledge of the witness Overton. As we have seen, the only discoverable ''member of my family'' is Anson Mills himself; but when Anson Mills acquired his stock in this company, under what circumstances he acquired it, or what consideration, if any, he paid for it, this record is entirely silent; it may be said of him as of those whom he transferred his stock to, when he ''lost confidence'' in the mine and desired to avoid corporate liability, that there is no proof that he himself ever paid a penny for the stock that he was so liberal with under the conditions mentioned. In addition to this,

there is no proof in this record that the witness Overton was so related to Anson Mills at the time when Anson Mills acquired his stock, that he, the witness Overton, is able to speak, as of his own knowledge, of or concerning any consideration paid by Anson Mills for the stock that stood in his name. So far as this record instructs us, the witness Overton was not even acquainted with Anson Mills at the time when Anson Mills acquired the stock which stood in his name; and certainly there is no proof that the witness Overton personally participated in the transaction whereby any stock in the Presidio Mining Company was originally transferred into the name of Anson Mills. In point of fact, all that the witness Overton assumes to testify to in the place in question is a mere piece of hearsay gossip, not founded upon personal knowledge, and not dealing upon any fact or facts within the personal knowledge of the witness Overton. In a word, taking together all of the disclosures of the evidence upon this point, we decline to accept the statement contained in the appellee's brief "that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff paid $60,000 cash for their stock".

The unmistakable conclusion from the record before this court must be, we venture to believe, that instead of this controversy representing any widely diffused protest on the part of the stockholders against the defendants, the litigation must be regarded as an effort upon the part of a single minority stockholder to "control the management", if he can, no answer being possible to the proposition that if the other stockholders, whether minority or majority, sympathized with the purposes of

this bill, they would have shown their sympathy in the practical form of intervention; and, as pointed out by Circuit Judge Sawyer,

> "It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex,* very properly applicable."
>
> *Dannmeyer v. Coleman,* 11 Fed. 97, 101.

SUPPORT OF APPELLEE BY STOCKHOLDERS:

Although at liberty to do so, yet not another stockholder, whether majority or minority, has intervened in this cause in sympathy with the purposes of this bill; and the inference that the other stockholders did not intervene because they were not justified in doing so, is not unreasonable.

In our opening brief, we have pointed out that though originally this suit was brought by "W. S. Overton and Carl A. Martin on behalf of themselves and other minority stockholders of the Presidio Mining Company, named in this complaint", yet, by the time the litigation reached the amended bill, all reference to any other stockholder than Overton and Martin had disappeared from the title of the cause; we further pointed out that not a single other stockholder intervened in the litigation as a co-complainant; and we directed attention to the views of the courts that the circumstance that no other stockholder has sought to intervene in the action justified an inference distinctly favorable to the defendants. Attempt is made in the appellee's brief, at page 78, to reply to these suggestions, but no claim is made that any other

stockholder, whether minority or majority, intervened as a co-complainant; and relying upon a statement contained in a pleading, which as a pleading had disappeared from the cause, it is stated, as an excuse, that the majority of the minority stockholders reside in distant states. Where, we ask, is the proof to be found in this record that "the majority of the minority stockholders reside in distant states"? The reference on page 78 of appellee's brief to page 2 of the transcript of record is a reference to seven persons; but on pages 31-2 of the transcript of record, and on page 38 of the transcript of record, will be found a list of the so-called minority stockholders of this company (see in this connection page 44, paragraph 10 of amended bill); this list, exhibit A, includes some 26 stockholders; what page of this record can this appellee put his finger upon as establishing that anyone of these 26 stockholders "reside in different states"? To sum up in a single sentence the entire situation in this regard, we challenge this appellee to identify a single page in this record which establishes that, Overton and Martin aside, a single other stockholder of the defendant company, at the time of the commencement of this litigation, or since, "reside in distant states". But, moreover, let us assume that these stockholders did "reside in distant states"; why should that circumstance impede them from intervening in this cause if they believed that this complainant had a legitimate ground for complaint, or that these defendants had done anything really detrimental to the interests of this company? In our discussion in our opening brief of the subject of laches we went into this question of residence in distant states; and we there pointed out

how transparent such a pretext was; and it will serve no useful purpose to repeat that discussion here.

It is in this connection, that the statement is made that "it appears from the record and the testimony that Captain Overton by reason of the support of the minority stockholders has been placed on the directorate of this company in spite of the most violent opposition of the appellants and their counsel"; and we hasten to characterize this, also, as a statement wholly unsupported by the proof contained in this record. No better refutation of this claim could be desired, we think, than the very pages themselves of the record to which reference is made in the effort to support this declaration; and since it must be assumed that this appellee has referred to the pages which most strongly favor the position taken by him, it must necessarily follow that if those pages fail to sustain his claim, the inquiry need not be prosecuted further. The first page cited to support this extraordinary statement is page 354; but upon that page, no word can be found to establish either the support of Overton by the minority stockholders, or his election to the directorate against the most violent opposition of the appellants and their counsel; at this place, the only suggestion of antagonism of any character was a statement, not that appellants and their counsel violently opposed the entrance of Overton into the directorate of the company, not that Mr. Ralph was violently antagonistic to the election of Overton as a director, but that *in the proceedings in the meetings,* Mr. Ralph was antagonistic to Overton. When we turn to the next page cited, viz., 377, we are constrained to dismiss the citation

with the single observation that no reference is made there in any form either to the support of Overton by minority stockholders, or to any opposition to his becoming a director by either the appellants or their counsel. At page 579, the next reference, not a syllable bearing upon this subject matter makes its appearance. Page 593, the next reference, deals with circumstances ensuing upon the opinion of counsel for the company relative to the change in the date of the holding of the annual meeting of the company; counsel advised the president of the company that the amendment to the by-laws altering the date of the annual meeting was in conflict with the provisions of the Civil Code of the State of California, an opinion which was well grounded and which has never been impeached; following this opinion, no meeting was held; and these are the circumstances referred to on pages 592 and 593 of the record. At that place, the solitary reference to the minority stockholders is contained in the following sentence from the testimony of the appellee himself, "we had a meeting of the minority stockholders, but a quorum was not present as prescribed by the by-laws". Whom he referred to by "we", no man can say; what minority stockholders he referred to, no man can say; whether the attitude of these minority stockholders was friendly or unfriendly to the appellee, no man can say; and while he states that he had in person or by proxy a trifle over 36,000 shares, yet, while we do know what his personal holdings were, we are not advised as to the character or limitations of the proxies referred to, or the number of minority stockholders represented by the alleged proxies. And certainly there is no proof here that in any prac-

tical sense he had the support of the minority stockholders, or that his entrance into the directorate of this company was effected "in spite of the most violent opposition of the appellants and their counsel". And finally, the last page cited in support of this declaration, is page 771 of the record; that page contains a portion of the testimony of Mr. Noyes on direct examination; it dealt with the acquisition of Section 5, and the basis upon which the $45,000 mentioned in the resolution of February 15, 1913, was arrived at; not one word can there be found touching, however remotely, upon any support of appellee by any minority stockholders; not one word can there be found touching, no matter how remotely, upon the entrance of this appellee into the directorate of this company in spite of the most violent opposition of appellants and their counsel. Such, then, is the assertion made in this brief; such, then, is the condition of the record upon which that assertion is uttered; and we submit that the mere contrast between the disclosures of the record upon the one side, and the extravagant assertion of the appellee in his brief on the other side, is the best possible answer that can be furnished to that extravagant assertion. In point of fact, this record fails to show how the appellee became a member of the board of directors of this company; and, for anything that this record shows to the contrary, he was elected to that post by the votes of the majority stockholders themselves. Nowhere throughout this record that we have been able to discover can there be found any proof of opposition either by appellants or their counsel, whether violent or otherwise.

MESSRS. PARCELLS AND RALPH, AND THE WILLIS ESTATE:

Before any person's rights of person or property can be invaded, due process of law requires that he shall be given adequate notice and a proper opportunity to appear and defend; no person should be adjudged guilty of participation in alleged fraudulent practices without having been accorded his day in court upon that question.

We have, in our opening brief, called attention at pages 34-36 to the manner in which Mr. Parcells, Mr. Ralph and Mrs. India Scott Willis, deceased, have been adjudged guilty of participation in fraudulent plans, although no one of them was a party to the action or ever had his day in court or any opportunity to defend upon any question in the cause which concerned him or his property. In this connection, we wish to remove any possible ambiguity which may lurk in the statement of our opening brief, page 35, that "Mr. Ralph never was a member of the board of directors"; we would not have this statement interpreted to mean that Mr. Ralph was never at any time a member of the board of directors, but only that during 1912, and subsequent years down to about January, 1917, he was not a member of the board of directors; in other words, while the history with which we are concerned in this cause was in the process of making, Mr. Ralph was not a member of the board of directors of this company, and did not become such until approximately one year prior to January 5, 1918 (see this fact stated in affidavit of appellee on page 354 of the record).

In reply to our complaint that Mr. Parcells, Mr. Ralph and the estate of India Scott Willis, should not have been adjudged participants in a fraudulent scheme with-

out having been accorded an opportunity to hear and defend, the statement is made, on page 91 of appellee's brief, that Mr. Parcells and Mr. Ralph had a full opportunity to present their side of the case upon the hearing of an order to show cause why an injunction should not issue restraining the transfer of certain shares of stock of the defendant company; it nowhere appears that this order to show cause was ever served upon either Mr. Parcells or Mr. Ralph, or that either of them participated in the hearing thereon, or that the injunction *pendente lite,* which ensued, was addressed to them or to either of them (see record pages 291-300). It does appear, on pages 300 and 301, that after the injunction *pendente lite* was issued, it was served by the Marshal upon Mr. Parcells; but it nowhere appears that any such service was made upon Mr. Ralph. We submit, therefore, that nothing here disclosed can possibly be regarded as justifying the finding and decree of the learned Judge below convicting Mr. Parcells, Mr. Ralph and Mrs. India Scott Willis of participation in any fraudulent scheme whatever; and that the attempted answer to our complaint on this score is no answer whatever. When, indeed, did any of these parties get what the appellee's brief on page 92 calls "a full and fair hearing"? Where is the evidence which implicates them as participants in any fraudulent plan or scheme? Why should these parties, against whom no evidence whatever was produced, have their good names tainted by a solemn decree of a court adjudging them guilty of fraud, made in an action to which they were not parties, in which they were never represented, and upon a record

barren of any incriminating circumstances whatever as against them?

RESULTING TRUST:

> **Notwithstanding belated denials by appellee, his original position was that, contemporaneous with, and as part of, the acquisition of Section 5, the Presidio Mining Company intentionally furnished the money with which the acquisition was made; the subsequent withdrawal from this position is in itself a confirmation of the financial inability of the company to make the purchase; and the change of front from the claim of resulting trust to that of constructive trust indicates a degree of uncertainty in the mind of appellee inconsistent with distinct definiteness of grievance.**

This subject matter is referred to at various places in the appellee's brief and, without doubt, one excerpt upon this subject matter will serve as a sample for the rest. Thus, on page 129 of appellee's brief, we find the following assertion made:

> "On the question of resulting trust; we never have asserted any resulting trust, neither has there been any change of front by complainants, as asserted on page 303 of said brief."

This subject-matter is fully discussed in our opening brief upon pages 303 and following, and it would serve no useful purpose to renew that discussion here. All that we can ask this court to do is to take the original, amended and supplemental bills, lay them side by side, and contrast the positions taken in them; if this be done, we have no fear as to the result. We desire, however, to call attention to the dogmatic denial contained in the passage just quoted from the appellee's brief; and if this court, from a comparison of the appellee's own pleadings, should reach the conclusion that he began

with a resulting trust, changed front, and ended with a claim of constructive trust, then we ask what type of argumentation is that which, in the face of such a situation as we have just referred to, can make the dogmatic assertion contained in the passage just quoted from? And if the court should determine that the passage just quoted from is at variance with the disclosures of the pleadings, then, since the subject matter is one upon which no mistake could well be made, the inquiry does not become impertinent as to the motive which led to the making of the statement so plainly and consciously at variance with the facts.

In this connection, we hope we may be pardoned a recurrence to the following passage to be found on page 198 of our opening brief:

> "Obviously, the position of Mr. Noyes at the time of that purchase, the situation of the company at that time, and the relations, such as they were, between him and the company, were not such that any duty, obligation or trust rested upon him, requiring him either to purchase Section 5 for the company, or to refrain from purchasing it for himself; not only was the Presidio Mining Company without 'the better right' to Section 5, but it had no 'right' of any character to the section (Stark v. Starrs, 6 Wall. 419; Meader v. Norton, 11 Id. 458); and after he did acquire the section, he did not operate it in independent opposition to, or competition with, the Presidio Mining Company."

We have searched in vain throughout the appellee's brief for any reply to the suggestions here made; and indeed, taking into consideration all of the circumstances of this case, we are not able to see what reply could be made. The essential ideas of this passage are contained in Section 2224 of the Civil Code of California, which

provides that one who obtains a thing by fraud, or the violation of the trust or other wrongful act, is

> "unless *he* has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person *who would otherwise have had it;*"

and in the application of the principle involved in this section, the courts attach importance to the expression "the person who would otherwise have had it". Thus, for example, in *Plummer v. Brown,* 70 Cal. 544, it is held that in an action by the unsuccessful claimant to compel a conveyance of the legal title, the claimant must allege and clearly prove that he occupies such a status as gives him the right to control the legal title; and in this connection, the case of *Stark v. Starrs* above cited is referred to as a commanding authority. So, also, in *Buckley v. Howe,* 86 Cal. 596, *Plummer v. Brown* is approved, the court holding that

> "plaintiff must also show that she herself occupies such a status towards the property as entitles her to control the legal title".

And likewise in *Crosby v. Clark,* 132 Cal. 1, the same principle is applied, the court quoting Section 2224 above referred to. In *Stark v. Starrs,* 73 U. S. (6 Wall.), 402, the Supreme Court took the ground that

> "the plaintiff must first show in himself some right, legal or equitable in the premises, before he can call in question the validity of the title of the defendant";

and then, after referring to certain authorities, further observes,

> "these are only applications of the well established doctrine that where one party has acquired the legal title to property *to which another has the better right,* a

> court of equity will convert him into a trustee of the true owner and compel him to convey the legal title".

Likewise in *Meader v. Norton,* 78 U. S. (11 Wall.) 442, this passage from *Stark v. Starrs* is referred to with approval; and in *Johnson v. Towsley,* 80 U. S. (13 Wall.) the doctrine of *Stark v. Starrs* is again approved. In other words, as we observed in the passage above quoted from our opening brief, not only was the Presidio Mining Company without "the better right" to Section 5, but it had "no right of any character to that section"; and it was not in the category of persons referred to in Section 2224 of the Civil Code as those "who would otherwise have had" Section 5. And all of this was particularly true because in the relations between Mr. Noyes and the Presidio Mining Company there was none of that peculiar "confidence" which is so much dealt with by courts of equity:

> "here, there was no trust or confidence other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance".
>
> *Taylor v. Kelley,* 103 Cal. 178, 183.

THE OSBORN STOCK:

The transfer of stock from Osborn to Noyes was quite as valid as the transfer of stock from Mills to Overton; no extortion by Noyes has been exhibited, or existed; and in making the transfer, Osborn executed the desire of his donor that Mr. Noyes should share.

Our views concerning the Osborn stock episode, are fully stated in our opening brief. That subject matter is referred to likewise by the appellee; but here again we encounter that confusion of thought so characteristic of the appellee's brief. From first to last, no attempt

is made to reason out the facts connected with Boyd's transfer to Osborn and Osborn's transfer to Noyes; and while here and there, in one form or another, the claim is repeated that Mr. Noyes extorted this stock from Osborn, yet the brief is singularly deficient in its references to specific facts even remotely tending to support that accusation. Nor is there anything contained in the allegations set forth on pages 151-2 which in any way qualifies the position taken by Mr. Noyes relative to this stock. In his testimony, Mr. Noyes plainly stated that Osborn had been holding this stock as trustee for him (Noyes) since 1907; and that in December, 1912, when Mr. Noyes renewed his effort to establish the cyanide plant, and rather than see the company disintegrate, determined to install that plant by his own unaided efforts, he told Osborn that if any responsibility were to be assumed, he was prepared to assume his share thereof, and requested Osborn to make the formal transfer upon the books, which was done. There is nothing, we submit, in the allegations quoted in the appellee's brief which in the remotest degree impeaches this testimony; those allegations are nothing more than allegations of the mere fact of the transfer; and there is nothing contained therein, or in the testimony of Mr. Noyes, inconsistent with the proposition that on December 12, 1912, Mr. Osborn was the principal stockholder of the corporation,—indeed, he would be that though all of his stock were held in trust.

It may, we think, here be added that during our discussion of this Osborn stock episode contained in our opening brief, we directed attention to the two letters

of December 14th and December 25, 1907, written by Osborn in California, to Mr. Noyes in Texas, at a time when Mr. Noyes had no knowledge of the purposes of Mr. Boyd with reference to his stock; and we pointed out that the first information that Mr. Noyes received concerning that subject matter, he received from Osborn himself; we submitted that state of facts as bearing upon the gross improbability, not to say impossibility, that Mr. Noyes had extorted this stock from Osborn, and we find nothing in appellee's brief at all calculated to disturb the views which we have expressed in this connection.

THE OSBORN SHORTAGE:

> **No proof was made that, on or prior to December 12, 1912, Mr. Noyes was aware of this shortage, or that it was utilized by him to extort stock from Osborn, or that it was "concealed" by Mr. Noyes.**

This subject matter is very fully discussed in our opening brief. That the shortage occurred seems to be nowhere disputed; that Mr. Noyes loaned Osborn the money with which to make good that shortage, cannot be contested; but stress is still put by the appellee, in his brief, upon the claim that Mr. Noyes discovered this shortage prior to December 12, 1912, and used it as an instrument to compel Osborn to transfer to him one-half of the stock which Osborn had been given by Boyd; and incidental to this claim, it is urged that Mr. Noyes "concealed" the Osborn shortage. But the testimony of Mr. Noyes, not only uncontradicted, but also corroborated, is directly to the fact that he did not discover the Osborn shortage until, in connection with the establishment of the new cyanide plant, he had occasion to

inquire into the available cash of the company; this inquiry led to the discovery of the shortage on the 19th or 20th of January, 1913; and immediately upon this discovery, Mr. Noyes wrote to Mrs. Willis the letter of January 23, 1913, which appears in the record. Until conditions at the mine rendered the pan-amalgamation method obsolete, and demanded its supersession by the establishment of the cyanide plant, Mr. Noyes had no occasion to make inquiries into the available cash resources of this company; as we pointed out in our opening brief, his activities were centered upon the actual mining operations; and there was no more reason why he, rather than, for example, Gardiner or Herger, should have known of this shortage prior to the time when circumstances forced it on his attention.

And in passing, it may be observed that, although Gardiner and Herger were continuously in San Francisco, and had their office in the same building with Osborn—had their office so close that they were called to directors' meetings by a knock of Boyd's stick upon the floor—although they were not away in Texas concerned with actual mining operations, and although they were directors of this company from 1907 to 1913, yet neither of them ever knew of the existence of this shortage; nor is there any proof in this record that any other officer, director or stockholder of this company had any knowledge of the shortage prior to January, 1913; and yet, if you please, Mr. William S. Noyes is to be charged with knowing something which no one else knew anything whatever about. This is, indeed, but another instance of the attempt to claim

fraud by the most improbable contentions, by disregarding natural deductions and probabilities, and by presuming men to be dishonest instead of honest—and that, too, not only without evidence to justify the claim, but in the very face of the actual evidence itself. To claim belief at once in a theory and also in a fact which contradicts it is a form of credo unrecognized by moderate and reasonable men; but to believe in a theory because a fact contradicts it is a mental distortion valuable only as it illustrates the illimitation of human dotage.

And Osborn's motive for secrecy is, as it must be, fully conceded even by this appellee, for, on page 157, we find it conceded that "Osborn was fearful of a disclosure of his crime"; and since this was Osborn's state of mind, it is absurd to believe that he would have said or done anything which would have brought about the discovery of that which he was so anxious to conceal.

On page 156 of the appellee's brief, it is plainly stated that "Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539), to have run the company with four dummy directors"; but if, upon the one hand, "Osborn was fearful of a disclosure of his crime", and if, upon the other hand, "Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539), to have run the company with four dummy directors", upon what principle is Noyes to be charged with knowing, prior to December 12, 1912, a condition unknown to any other person interested in this com-

pany? If the one party were concealing his dereliction, and if the other party would not have countenanced him in the running of the company if he had known of this dereliction, according to what logic, then, is the latter to be charged with knowledge of a dereliction concealed from all concerned?

It is in this connection that repeated reference is made to the testimony of Kniffin. It is indispensable to the appellee's contention that Mr. Noyes should have known of this Osborn shortage prior to December 12, 1912, since that knowledge was the instrumentality, according to the contention of appellee, through which he brought about the transfer from Osborn to himself on that day of one-half of the Boyd stock; and therefore, any evidence which fails to establish that, prior to December 12, 1912, Mr. Noyes knew of this Osborn shortage, can not be of the slightest judicial consequence; for, obviously, if Mr. Noyes did not learn of the Osborn shortage until after Osborn had already transferred to him the one-half of the Boyd stock, then, plainly, such knowledge could not have been instrumental in bringing about that transfer.

Notwithstanding all this, however, Kniffin's testimony is characterized as clear and reliable, "both as to time, place and occurrences" (appellee's brief, page 85), and "clear and convincing" (appellee's brief, page 188). We are, however, constrained to dissent from this characterization of Kniffin's testimony, and to refer to our analysis of that testimony as contained in our opening brief. No answer, indeed has been made, or can be made, to the outstanding fact that Kniffin was

absolutely unable to testify that at any time during the month of December, 1912, and, in particular, prior to December 12, 1912, Mr. Noyes had any knowledge whatever of or concerning the Osborn shortage; and as we have already pointed out, knowledge acquired for the first time subsequent to the date of the transfer of the Osborn stock to Mr. Noyes could not possibly have influenced that transfer.

At page 7 of the appellee's brief, the declaration is made that Kniffin arrived December 24, 1912; but the fact is—and here again we encounter that reprehensible looseness about dates when dates are of importance to the ascertainment of the real truth of the transaction—that Kniffin testified,

> "I went first to Shafter in connection with this matter in the year 1910, I think it was. I went there again on or about December 23, 1912, in connection with the installation of this plant. Mr. William S. Noyes and Mr. E. M. Gleim met me at the station" (984).

There is no proof whatever that between 1910, when Kniffin first went to Shafter "in connection with this matter" and December 23, 1912, when he went again and met Mr. Noyes at the station, Kniffin had met Mr. Noyes or had had any conversation or other communication, oral or written, with him; and so far as the record before us discloses, "on or about December 23, 1912" was the first opportunity, subsequent to December 12, 1912, which presented itself when Mr. Noyes could have made any statement to Kniffin indicating prior knowledge upon his part of any shortage by Osborn. There is no claim anywhere in this

record that on that occasion Mr. Noyes made to Kniffin any such statement as this, for example,

> "Kniffin, during the early days of this month, I discovered that Osborn was short between ten and eleven thousand dollars in his accounts";

nor is there the slightest pretense that at any time or place Mr. Noyes ever made to Kniffin any statement of any kind upon that subject; and our views concerning Kniffin's testimony in so far as it attempts to touch upon either Mr. Gleim or Mr. Burcham, have already been fully developed in the opening brief.

At page 85 of the appellee's brief, the question is asked,

> "If Kniffin's testimony and statements that he had been informed of the Osborn shortage in the early part of January, by Gleim, had been untrue, why did not defendants have Gleim contradict the statements made?"

But we reply to this inquiry by making another, namely, since Kniffin's testimony was grossly uncertain, vague and indefinite as to points of time, since no foundation was laid whereby Mr. Noyes could be bound by any declaration of Mr. Burcham or Mr. Gleim as to the condition of the treasury of the company, since Kniffin himself was uncertain as to whether the statement in connection with the shortage was made by Gleim or Burcham, and since Kniffin's testimony fixed January 13, 1913, as the date of the statement by Gleim or Burcham, whoever it was—over a month after the transfer of the stock by Osborn to Noyes had been fully consummated—what occasion was there for contradicting testimony which broke with its own weight? To put a witness upon the stand

to contradict testimony which establishes nothing is to beat the air; and Kniffin's testimony nowhere shows, directly or indirectly, proximately or remotely, that prior to the transfer by Osborn to Noyes of the one-half of the Boyd stock, Noyes had then any information of or concerning any shortage by Osborn. At first, Kniffin was uncertain as to whether it was Gleim or Burcham who referred to the shortage; at the top of page 949, he says:

> "I was informed of the Osborn shortage sometime in the early part of January; I was told by either Mr. E. M. Gleim or Mr. William D. Burcham";

and significantly enough, this indecision and uncertainty of the witness was sought to be corrected in the question immediately following which eliminated Burcham and limited the identity of the informer to Gleim, a limitation which thereafter, having received his cue, Kniffin adhered to. He follows this up by stating that

> "Mr. Gleim told me that money they thought they had had been taken from the treasury and they did not have it",

but he makes no attempt whatever to establish when it was that Gleim learned this interesting fact; and his testimony is entirely consistent with the theory that Gleim learned that fact on the very day when, according to Kniffin, Gleim communicated the information to Kniffin. In a word, and without pursuing this analysis further, the attempt to fasten upon Mr. Noyes knowledge of the Osborn shortage on or before the transfer of the stock in question was so complete, unmistakable and manifest a failure that no experienced

counsel would have wasted his time or the court's in seeking to contradict it—we do not contradict that which proves nothing as to the matter in hand.

On page 132 of appellee's brief, the statement is made that

> "Kniffin testified he was informed by Gleim the early part of January that Osborn was short in his accounts, and to hold off on the cyanide installation until financial matters were re-adjusted" (949).

But what Kniffin testified to at page 949 was this:

> "I was informed of the Osborn shortage sometime in the early part of January; I was told by either Mr. E. M. Gleim or Mr. William D. Burcham";

he was then asked to fix the time "as near as you possibly can", and he went on to explain "as near as he possibly could", and he said,

> "It was the early part of January. I returned to Shafter about January 3rd and did some other detail work on the design of the mill. I was then ready to proceed with the construction, and Mr. Gleim told me that the money they thought they had had been taken from the treasury and they did not have it. Then, finally, on the 19th day of January, he gave me orders to start the work. I started the work on the 20th."

Plainly, this testimony leaves exceedingly indefinite the vague phrase "the early part of January"; and no attempt is made by the witness to fix any particular date between January 3rd, when he returned to Shafter, and January 19th, when Gleim gave him orders to start the work. But upon cross-examination, we learned that during this interval something was said. On cross-examination, he tells us that he arrived

> "about the third of the month, and it was some time after the third that he (Gleim) told me; when he told me, I had been there some little time; I do not know exactly how long—I could not say; it might have been ten days; I think it would be about ten days. I should say he told me that on or about the 13th of January" (957-8);

but if Gleim told him on or about the 13th of January, 1913, the question still recurs, even upon Kniffin's story, assuming that any reliance can be put upon his memory as to dates, as to when Gleim himself learned the fact which he communicated to Kniffin; and Kniffin's testimony is entirely consistent with the fact that Gleim never learned of any shortage until the very day when he communicated that fact to Kniffin.

We fail to grasp just what is meant by the statement on page 188 of appellee's brief, that

> "the testimony of Overton shows that Kniffin was the man who communicated the fact of the Osborn shortage to him (616). It is also clear from Kniffin's testimony that William S. Noyes was at the plant during all this period, which is corroborated by the other testimony in the case."

But while no one has ever disputed Mr. Noyes' presence at the mine during January, 1913, where is the proof that at this period Kniffin was acquainted with the appellee or his address, so that he might communicate to the appellee the fact of the Osborn shortage? Is this another of those statements, so frequent in this brief, which cannot be accepted as reliable? We submit that there is no proof whatever in this record that during January, 1913, Kniffin knew that any such individual as this appellee was in existence; and whatever and however extravagant may be the implications of the above

quoted passage from the appellee's brief, the actual testimony gives no countenance whatever to them.

We know from the testimony of the appellee that in 1915 he came to San Francisco, not to inquire into the affairs of a company in which the donor of his stock had "lost confidence" and for which he and his family had so little regard that they had forgotten what stock stood therein in their names, but to visit the Exposition then in progress; while in San Francisco, he met Mr. Noyes; upon leaving San Francisco he went East by way of the mine, and thereafter he returned to San Francisco, and "I got here on the 6th of July, 1915" (583, *ad finem*). In other words, this record shows that "I came to San Francisco to visit the Exposition, in March of 1915" (580), and "I came back to San Francisco in July. I got here on the 6th of July, 1915" (583). Between the time when he paid his visit to the mine on his return to the East and the time when he returned to San Francisco, "before I came to San Francisco, I made an investigation in Texas" (616); but up to this time, he had had no communication whatever with Kniffin. After referring to the investigation which he made in Texas before he returned to San Francisco, the appellee goes on to say,

> "then, later, I got word from Mr. John W. Kniffin who told me—that is what you want. I got a telegram from Mr. John W. Kniffin that Osborn had been $27,000 short in his accounts, and that Mr. E. M. Gleim had told him so."

Evidently, during this investigation which took place in Texas prior to Overton's return to San Francisco, he had met Kniffin, or at all events he and Kniffin be-

came acquainted with the circumstance of each other's existence, and Kniffin acquired Overton's address. But the telegram which Kniffin sent to Overton and which the language used in appellee's brief at page 188 would suggest was sent during January, 1913, while Mr. Noyes was at the plant "during all this period", sheds additional light upon the inherent and ineradicable unreliability of any statement emanating from Kniffin.

When Kniffin was testifying as a witness, he made no claim that Gleim or Burcham fixed the amount of the Osborn shortage; but, if we are to take the statements of the appellee at their face value, Kniffin telegraphed the appellee

> "that Osborn had been $27,000 short in his accounts, and that Mr. E. M. Gleim had told him so" (616).

From what we know concerning the Osborn shortage, it is entirely manifest that Gleim could not have told to Kniffin any such extraordinary tale as that Osborn was $27,000 short in his accounts; no such shortage as that has ever been suggested by any reliable evidence in this cause; Gleim or Burcham, whichever it was, never specified to Kniffin any shortage of $27,000, or any other particular amount; and the whole incident is another item of evidence impeaching the reliability of Kniffin.

That Mr. Noyes actually knew of the Osborn shortage prior to, and at the date of, the transfer to him of one-half of the Boyd stock, namely, December 12, 1912, was a fact vital to the complainant's theory of fraud, as recognized on page 205 of the appellee's brief, "for complainants have stoutly maintained in the fed-

eral court that Noyes knew of the Osborn shortages before January 19, 1913". But it is, of course, obvious that the mere fact, assuming argumentatively such to be the fact, that Mr. Noyes "knew of the Osborn shortages before January 19, 1913," would be wholly without significance as establishing any fraud, unless it also appear that he knew of the shortage on or before December 12, 1912, when he acquired from Osborn one-half of the Boyd stock. Since it is established in this cause by the appellee himself (505-6) that Osborn transferred one-half of the Boyd stock to Mr. Noyes on December 12, 1912, and since accepting Kniffin's testimony for the purposes of this illustration, Mr. Noyes learned of the Osborn shortage on January 13, 1913, it becomes highly interesting to know how Mr. Noyes, in order to extort from Osborn one-half of the Boyd stock, could utilize facts which did not come to his knowledge until over one month after the transfer of the one-half of the Boyd stock had become an accomplished and completed fact. The mere circumstance, therefore, if it be a circumstance, that Mr. Noyes knew of the Osborn shortage before January 19, 1913, is entirely inefficient to assist the appellee's theory of fraud, unless the proof goes farther and shows that at the time of the acquisition of the stock in question Mr. Noyes then knew of the shortage, so that he might have employed that knowledge as the instrumentality through which to wrest the stock in question from Osborn.

On this same page, 205, it is stated that

> "the witness Kniffin testified he (Mr. Noyes) knew before this date (January 19, 1913) that Gleim had informed him (Kniffin)."

But as to these statements, we wish to enter our protest. The testimony of the witness Kniffin may be microscopically examined from end to end without finding therein any testimony by Kniffin to the effect that Mr. Noyes knew of the Osborn shortage before January 19, 1913; all that Kniffin pretended to swear to on direct examination was that Gleim told him "that money they thought they had had been taken from the treasury, and they did not have it",—a statement which, on cross-examination, he altered to the following form:

> "He (Gleim) had previously told me, sometime toward the first of the month, that there would have to be a suspension of some kind because they did not have any money" (949, 957).

Nowhere is there any evidence which we are able to discover, given by Kniffin to the effect that Mr. Noyes knew of this shortage before January 19th; there is not a syllable of evidence to show that there was any conversation or other communication between Kniffin and Noyes upon that topic, and just how Kniffin could assume to know the state of Mr. Noyes' mind upon this subject without some direct communication from him, we are unable to understand. The statement in this brief at this place that "the witness Kniffin testified he (Mr. Noyes) knew before this date (January 19, 1913)" is another of those statements which are so plentiful in this brief, upon which no reliance can be placed,—the witness Kniffin testified to nothing of this kind. And so far as the phrase "that Gleim had informed him", on page 205 of appellee's brief, is concerned, if that phrase is to be interpreted as carrying the impression that Mr. Gleim informed the witness Kniffin that Mr.

Noyes knew of the Osborn shortage before January 19, 1913, such interpretation would be grossly misleading and wholly irreconcilable with anything which Kniffin has sworn to. Kniffin has told us of statements which he attributes to Mr. Gleim; and taking those statements at their face value, there is not a word in them to show that Mr. Gleim told Mr. Kniffin that Mr. Noyes knew of the Osborn shortage before January 19, 1913.

At the same place, page 205 of appellee's brief, reference is made to the Willis letter of January 23, 1913, and from that letter the statement is quoted that "this is the second and more serious instance of this in the history of the company". When Mr. Noyes used this language, he had been speaking about Osborn; but while he states that this is the second and more serious instance in the history of the company, yet he does not state that this is the second and more serious instance in the history of the company in which Osborn was a participant. We believe, from our recollection of the record before us, that the passage here quoted is the first, last and only reference to any other "instance of this in the history of the company", and that there is no evidence anywhere in the record to show when the other instance occurred, or how it occurred, or what were its circumstances, or who participated in it; and therefore, to assume, as this appellee does, that Osborn was a participant in that prior instance is to assume a fact wholly unsupported by any evidence in the record. In this quotation from the Willis letter, there is not the remotest intimation that Osborn participated in this prior instance, or that Mr. Noyes

knew or believed that he did so; certainly, Mr. Noyes does not say so; and there is nothing in the record, as we have just observed, to indicate that such a statement would be justified. And yet, when we turn to page 156 of the appellee's brief, we find the statement actually made that Osborn was "known by him (Mr. Noyes) to have been short in his accounts before", and a reference in professed support of this statement is made to the very Willis letter which we are now considering. By what authority this last statement of the appellee is justified, we know not. Certainly no search of ours through the record indicates in any way whatever that Mr. Osborn participated in any manner or form in the prior instance referred to by Mr. Noyes in this letter, or that Mr. Noyes knew or believed him to have done so.

Something is said in the appellee's brief, commencing at page 196, concerning an item of $3500 as an additional peculation by Osborn; but this item does not seem to us to be of any special significance in the case, either as to the acquisition by Mr. Noyes of the one-half of the Boyd stock in December, 1912, or as to the purchase of Section 5. The position of the appellants, both below and here, is that on December 12, 1912, when the half of the Boyd stock was transferred by Osborn to Mr. Noyes, Mr. Noyes then had no knowledge of any shortage whatever by Osborn, whether great or small, or whether it included this $3500 item or any other item; that he did not learn of the Osborn shortage until the 19th or 20th of January, 1913, and that the Osborn shortage, as he then learned of it, aggregated

$10,689.75; and in view of these considerations, we fail to perceive the relevancy or importance of this $3500 item so far as any issue of fraud in this case is concerned. And obviously, the existence of this particular item, or Mr. Noyes' knowledge or ignorance thereof, was without the slightest influence in the matter of his purchase of Section 5; the item never entered into that transaction, and exercised no influence over it. If, by credible and satisfactory evidence, it were established that this $3500 item, along with the other items composing the Osborn shortage, were known to Mr. Noyes prior to December 12, 1912, and that such knowledge exercised influence over the transactions in question here, one might be disposed to give consideration to this particular item, otherwise, it does not appear to be of material importance.

CONTINUANCE OF OSBORN IN EMPLOY OF COMPANY:

There was neither fraud, nor detriment to the company, in retaining Osborn for a time, especially since his relations with the company funds abruptly terminated upon the discovery of his shortage.

The remark is made on page 163 of appellee's brief that "Noyes allowed Osborn to continue as director and secretary at $300.00 per month". But could a statement well be more partial or one-sided than this? In the interests of fairness, why should not all of the surrounding circumstances be stated so that the court might see this alleged circumstance in its true setting? We know that when the occasion arose in connection with the establishment of the new cyanide plant for exact information concerning the company's finances, Mr. Noyes, then in Texas, learned that Osborn was short in his

accounts. He then wrote to Mrs. Willis the letter of January 23, 1913, in which he puts an accent upon the proposition that "the company's funds are to be handled safely", in which he refers to his moral obligations to protect his friends if the company borrows money from them, in which he expresses his anxiety that "cash cannot be taken from the treasury unknown to the president", and in which, after referring to Osborn, he goes on to say, "he can keep the books but ought not to handle the cash" (537-9). We know also that following upon the discovery of the Osborn shortage, there was, so to speak, a reorganization of the company, and that in the course of this, Mrs. Willis' sympathies were strongly enlisted in behalf of Osborn's wife and children, sympathies which found a ready response in the good business policy of avoiding the disclosure of Osborn's fault during the then financial enfeeblement of the company. The result of all this was, as we have pointed out in our opening brief, that while Osborn was permitted to perform the duties as secretary, his control over the cash abruptly terminated; and from that time until he severed his connection with the company he was deprived of control over the funds. As we pointed out in our opening brief, it is not, we believe, of judicial consequence, whether the retention of Osborn for a time, purely as secretary, was or was not judicious, nor are we confronted by any evidence to show what this company would have gained if this unfortunate man's reputation were blasted and his family's prospects ruined, nor is it even necessary to speculate upon the effect upon this company's welfare of a public disclosure

of this depletion of its treasury; but the real question is whether this retention of Osborn, for a time, as secretary, was in itself an act of fraud or operated any real detriment to this corporation; and to this inquiry we submit that there can be but one reply. Certainly the retention for a time of Osborn as secretary of this company operated no influence upon the transfer of the Boyd stock on December 12, 1912, previously; nor did this fact have the slightest relation to the acquisition by Mr. Noyes of Section 5. And since this circumstance was productive of no detriment to the corporation that this record has disclosed, we fail to see how this fact can be tortured into a cause for complaint on the part of this particular appellee. As pointed out in our opening brief, no claim is made that Osborn was not a competent secretary. He understood thoroughly, and so far as we know faithfully performed, all of his duties in that regard; and while, out of all the stockholders in this company, whether minority or majority, the present appellee is the sole individual to complain that Osborn was not so free with information as he might have been, still, that same attitude could well have been, and as reports of decided cases show, frequently has been the attitude of secretaries of corporations who have never abstracted one penny of their corporate funds—in other words, no relation exists between the retention of Osborn for a time as secretary of this company and his general conduct as secretary simply, which can successfully transmute his retention into an act of fraud. Nor can any inference be fairly drawn from the passage above quoted from page 163 of appellee's brief, that Mr. Noyes allowed Osborn to

continue as secretary. The retention of Osborn was an act of the directorate, and, as the record shows, not long thereafter he severed his connection with the corporation.

MRS. WILLIS:

> **The insinuation that Mrs. Willis was an aged woman who became "an easy prey to these two brothers", is equally as ill-founded and untruthful as the claim that Mr. Noyes knew of the Osborn shortage on or before December 12, 1912, or the claim that Mr. Noyes ever was the "confidential agent" of the Presidio Mining Company for the acquisition of Section 5.**

There are some statements contained in the appellee's brief relative to this lady which, to express the thought mildly, have excited our surprise. She is referred to in more than one place, but the principal reference will be found at page 109 of appellee's brief; and it is with reference to the statements there contained, which are characteristic of other statements elsewhere scattered through this brief, that our surprise has been excited. For example, it is stated that she was an "aged widow", and this statement seems to have been made for the purpose of lending probability to subsequent accusations against Mr. Noyes and his brother. We cannot know, of course, what the appellee's conception of an aged widow may be; it is possible that he considers a lady of between 40 and 50 years to be an aged person; but in this conception we cannot concur. That Mrs. Willis was a widow, there can be no question; but that she was an aged widow, in the sense sought to be implied by page 109 of the appellee's brief, we flatly deny. Not only is there no evidence in this record definitely fixing this lady's age, but there are circumstances which

suggest the inference that she could not well have been much over fifty years of age, if that old. For example, Miss Doherty, testifying during the early part of 1916, tells us that Mrs. Willis had been a widow for 26 years; and since, in the absence of evidence, one conjecture is as good as another, there is nothing in this record to prohibit the thought that she was married at 20 years and that her husband died when she was 24 years old, which would leave her 50 years at the time of her death, in 1914 (317). And at all events, no witness in this record with whose name we are acquainted anywhere attempts to describe Mrs. Willis an as an aged widow; even her most intimate companion, Miss Doherty, describes her in no such manner; and the suggestion that she was an aged widow, is, like so many other suggestions in this brief, quite without substantial or any evidence to support it. But, properly read, page 109 of appellee's brief is not intended to convey the suggestion that Mrs. Willis was an "aged widow" merely, but the implication is that she was an aged widow of a special class, to wit: one who could be played upon by a shock, bewilderment, sympathy, prospective loss, confidence or persuasion,— a phase of the situation which is entirely without support in the record before us. Indeed, so far does the appellee go in this direction that he actually claims that "she was an easy prey to these two brothers", referring to Mr. Noyes and his brother. And in this connection it is asserted that "she did not consult independent disinterested friends or counsel (689-693). Surprise and sudden action were the chief ingredients in her course of conduct. Due deliberation was wanting". We submit that these flights of fancy are entirely without and be-

yond anything disclosed in the present record. There is no proof here of any shock or bewilderment, sympathy, prospective loss, confidence or persuasion in the sinister sense intended by this page of the appellee's brief; and while, in the letter of January 23, 1913, forwarded from Texas to Mrs. Willis, Mr. Noyes made suggestions intended for the betterment of this company, we think he would have been rather a poor sort if his training and experience did not naturally invest his views upon these matters with a reasonable amount of fair importance, when addressed to one who, like himself, was interested in the subject matter. But that there was either in this letter or in his subsequent conversations with her as detailed in this record any sinister or improper influence, this record completely repudiates.

It is said that "she did not consult independent disinterested friends or counsel", and pages 689 and 693 of the record are cited to show that she did not hold such consultation. But, when we turn to page 689 of the record in our search for evidence that she did not consult independent disinterested friends or counsel, we find ourselves doomed to disappointment, for nothing at that place in the record supports or tends to support the assertion made in appellee's brief; and when we turn to page 693, our inquiry meets the same fate. We venture the assertion that no page of this record can be specified by this appellee which sustains the assertion that Mrs. Willis did not consult independent disinterested friends or counsel; and there is nothing in this record inconsistent in any way with such action upon her part. In this connection it is stated that

"surprise and sudden action were the chief ingredients in her course of action, due deliberation was wanting"; and this assertion is as barren of support from the record as the assertion last referred to. No claim is made, or could be made, that Mrs. Willis, at the times mentioned, was anything but an intelligent woman; there is nothing in the disclosures of this record which impeaches her mentality in any way; and for many years prior to 1913, she had been more or less familiar, as this record indicates, with the general trend of affairs in the Presidio Mining Company; but, on January 23rd, Mr. Noyes had written her, from Texas, the letter which appears in the record, and, assuming that it would require four days for that letter to come from El Paso to San Francisco—a liberal estimate—she would have received it on January 27th. But Mr. Noyes did not arrive in San Francisco until "about the 5th or 10th of February" (689). If he arrived upon the 5th, then Mrs. Willis had nine days within which to consider his letter, and if he arrived upon the 10th, she had 14 days within which to consider that letter, and to consult "independent disinterested friends or counsel", if she desired to do so; and there is nothing in this record to show that she did not—she had ample time to do this. But, in the meantime, and prior to the arrival of Mr. Noyes from Texas, his brother, Mr. B. S. Noyes, had called on Mrs. Willis upon one occasion, and so stated in his direct examination at page 906. This prior visit was made upon the 22nd or 23rd of January, and on that occasion Mr. B. S. Noyes told Mrs. Willis what he had discovered as to the Osborn shortage and "asked what we should do about it" (906); and when Miss

Doherty was questioned concerning this same visit, she corroborated Mr. B. S. Noyes and testified that the one matter discussed upon the occasion of that interview was the recent discovery of the Osborn shortage (811). In other words, so far as this interview was concerned, neither surprise (except the natural surprise consequent upon the discovery of the Osborn shortage), nor sudden action, nor the absence of due deliberation, can be said to have been established. All that occurred was that Mr. B. S. Noyes, having just learned of the Osborn shortage, called upon Mrs. Willis, stated that fact to her, "and asked what we should do about it". There was no oppression of this lady, no crowding of her into a hurried and undeliberate course of conduct, no persuasion, no pressure, no advantage taken of any shock or any bewilderment; and instead of suggestions being then made by Mr. B. S. Noyes to her, he looked to her for suggestions, "and asked what we should do about it". Thereafter Mr. B. S. Noyes received a carbon copy of the letter dated January 23, 1913, from Mr. William S. Noyes to Mrs. Willis; and upon the receipt of this letter he called upon this lady again, and they had some further discussion concerning the Osborn shortage, and how the company was going to pull over the rough places; and at this second interview, Mrs. Willis, who had then received the letter of January 23rd, expressed her willingness, in accord with the suggestion contained in that letter, that Mr. B. S. Noyes should take the presidency of the company; and that was the length and breadth of this second interview, as explained by Mr. B. S. Noyes; and here, also, Mr. B. S. Noyes is corroborated by the testimony of Miss Doh-

erty, to the extent that Mrs. Willis was agreeable to the suggestion that Mr. B. S. Noyes should be elected president of the company, although Miss Doherty is unable to remember whether that willingness was expressed in a conversation or not (812). In all this, which is established by uncontradicted evidence, there is no trace of any surprise or sudden action: immediately upon the discovery of the Osborn shortage Mrs. Willis was advised of that unpleasant fact, and immediately upon the receipt of the carbon copy of the letter of January 23, 1913, this shortage was again discussed, and as a measure of precaution against a similar occurrence, the suggestion that Mr. B. S. Noyes should become president of the company was willingly agreed to by Mrs. Willis; what is there in all this to justify the implications sought to be insinuated by page 109 of the appellee's brief? We respectfully submit that a charge of fraud is not to be established by straining facts out of their real identity, or by disregarding natural situations, or by persistently presuming a man to be dishonest instead of honest; and we submit that it is impossible to find in the history of the relations between any of these defendants and Mrs. Willis any trace whatever of fraud, conspiracy, or wrongdoing upon the part of anyone. Finally, about February 5th or 10th, 1913, Mr. William S. Noyes arrived in San Francisco and had conferences with Mrs. Willis concerning the unfortunate situation which had overtaken this company. He tells us that:

> "After my return here to San Francisco, I went to see Mrs. Willis, and Miss Doherty at Mrs. Willis' apartments, and told her there was this shortage, and it left me in a

bad scrape, and the company in a worse one; that I had bought this Section 5 with money that I had borrowed; the company had these contracts which I had assured my friends were good; and the company could have that mine at cost if they wanted it. The mine that I refer to was Section 5. Mrs. Willis, of course, was very much perturbed over this occurrence. She said she did not see how they could take it. Miss Doherty felt the same way. * * * I had several conferences with both these ladies and one with Mr. Osborn. I told them that there was ore in there we could pull the company out with, notwithstanding the bad situation. We had all of these obligations that were assumed or agreed to be assumed, and it was too late to back out. I was out in round numbers $25,000 of my money put into the Silver Hill Mine, Section 5; I had obtained credit for the company at that time of about $44,000, I think it was; and it was almost too heavy a load for me to carry alone; that the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all of this, I thought it was only fair that I should have some compensation for it. Mrs. Willis said she thought so, too, and Miss Doherty joined in that, and I had a talk with Mr. Osborn and he agreed to the same thing; so we agreed between us if I furnished a lease to pay me one-half of the net, and that would be a fair division; so I agreed to carry on the business on that basis. I talked to Mr. Peat in regard to that same proposition and my brother who in February was a director, and Miss Doherty who became a director on January 31st, I believe —I only know that from the minutes. At the time of this transaction, I and Miss Doherty and my brother had just become directors; I was in Texas when I was elected a director; I came up about ten days afterwards; I was in Texas in January and returned here in February'' (pages 689-90, 691-2).

And in speaking of these conferences, Miss Doherty testifies in general corroboration of the history related

by Mr. Noyes, and to no fact which contradicts it; and because, both upon direct and cross-examination, Miss Doherty explained the confidence which Mrs. Willis had in Mr. Wm. S. Noyes and how she relied, and Miss Doherty herself relied, entirely upon his judgment, as to the mode of meeting the disaster which had fallen upon the company, this appellee, in whose disordered imagination no act of any one differing in opinion from him can possibly be right, must, if you pelase, describe this lady, Miss Doherty, as the echo and pliant tool of Mr. Noyes. But we are quite content to submit that phase of the case to the same discriminating judges who disposed of *Cowell v. McMillin,* 177 Fed. 25: And whether Mrs. Willis or Miss Doherty was the echo and pliant tool of Mr. Noyes or not, whether surprise and sudden action without due deliberation were or were not the chief ingredients in Mrs. Willis' course of conduct, what was wrong with the suggestion contained in the letter of January 23, 1913, that such steps should be taken by the larger stockholders in the company as to prevent a recurrence of such a disaster as the Osborn shortage? Was not the suggestion reasonable, well timed, and intended for the betterment of the company? Who dare say that it was not? Why should not that suggestion have been accepted by Mrs. Willis and by Miss Doherty, and what wrong was there in Mrs. Willis doing for Mr. B. S. Noyes one-half of the same thing which Anson Mills did for this appellee, in the matter of transferring stock into his name? If it was right for Mills to give 10,000 shares of stock to Overton, what was wrong about Mrs. Willis giving 5000 shares of

stock to Mr. B. S. Noyes? What concern of this appellee was it that she gave Mr. B. S. Noyes 5000 shares of stock, any more than it was any concern of hers that Mr. Anson Mills gave W. S. Overton 10,000 shares of stock? The stock was Mrs. Willis personal property; she had the absolute right to transfer, and Mr. B. S. Noyes to receive, those shares of stock, and, as we pointed out when discussing this subject matter in our opening brief, if there were any fraud *inter partes,* that would be no concern of any third person, but would be a matter of which Mrs. Willis alone could take advantage. But this record fails to disclose the existence of any impropriety whatever as between Mr. B. S. Noyes and Mrs. Willis in this matter of the five thousand shares of stock; the evidence discloses that she made to Mr. B. S. Noyes a voluntary gift of that stock, which was a perfectly valid act which she had an absolute right to do; and never once that we are advised of, during the reminder of her life, did she ever, by word or act, seek to impeach the *bona fides* of this transfer. And in so far forth as consideration is concerned, so far as this record discloses, Mr. B. S. Noyes gave to Mrs. Willis precisely the same consideration for the transfer of the stock to him as the present appellee gave to Anson Mills for the transfer of the stock to him.

In other words, taking together the whole record in this case, and considering all of the facts, no justification, we submit, can be found for the extravagant and far-fetched assertions contained in appellee's brief concerning the relations between Mrs. Willis and any of these defendants.

THE PURCHASE OF SECTION FIVE:

> At the time of the acquisition of Section 5, Mr. Noyes, being then not a director but a "salaried employe" of the Company, was under no duty or obligation to the Company either to refrain from acquiring the section for himself, or to acquire it for a Company whose fiduciary he was not, which had no right, title, interest, estate or expectancy in the section, which had never formulated any plans as to the section that any act of his could have frustrated or did frustrate, which was not organized to acquire the section, which had never expressed any intention or purpose to acquire the section, which had never originated a negotiation or expended a dollar in any effort to acquire it, which was financially unable to acquire the section even if it entertained the intent to do so, which was then confronted with a depleted treasury, upon one side, and an $80,000 cyanide plant installed upon credit obtained by Mr. Noyes from his friends, upon the other side, and which was so utterly without credit that neither the bank at the place of the works nor the bank at the place of the office would lend it necessary sums without additional security or a personal guaranty: nor was he under any duty to make loans to it or purchase property for it from his private funds, or by the use of his personal credit.

This subject matter has been so fully discussed in our opening brief that we are content to rest our case thereon, and shall do no more at this place than call attention to one or two examples of the inability of this appellee to distinguish between a fact and his hallucination about a fact. Speaking with reference to the acquisition of Section 5, on pages 112-113, a reference is made to our brief which seems to us to be rather singular. We introduced our discussion concerning Section 5 by a brief paragraph on pages 105-6, summarizing the general facts with regard to Section 5 before descending to specific particulars for the purpose of ascertaining what, if any, fraud tinged Mr. Noyes conduct with regard to the acquisition of this section; and it is this

portion, and this portion only, of our discussion which is referred to by the appellee upon pages 112-13 of his brief. But in discussing Section 5, we sought to develop the various propositions numbered from 1 to 17, which may be found conveniently grouped in the index to our opening brief, under the general heading of "Section 5"; but we look in vain through the appellee's brief for any orderly, systematic, logical discussion of these propositions, and we look equally in vain for any effective answer to them. But, upon page 113 of his brief, after referring to our mention of the early vicissitudes of this property, of the fact that Mr. Noyes purchased it with his own funds, and of the fact that publicity was given to that purchase to the leading stockholders directly at the time of its acquisition and to all the stockholders by the annual report of 1913, the appellee goes on to say that "there never was a report to any stockholder, or any annual report sent to the eastern stockholders, showing that Noyes paid $24,009.33 for the property or any other sum". It must, however, be remembered that the annual report of 1913, after pointing out the inefficacy of the old pan-amalgamation method and the necessity for the installation of the cyanide plant and the natural indebtedness incident thereto, goes on to discuss the following facts:

> "Early in 1913, Section 5, adjoining the Presidio Mine was put on the market for sale. This company being unable to buy it, having exhausted its credit on the new installations aforementioned, it was purchased by the writer (Mr. William S. Noyes) and an arrangement made whereby this Company will work it on terms of a division of the net, and perhaps will purchase the same later on. Late developments of Section 5 indicate that it will be a source of large revenue" (see this report quoted at pages 628-630).

In a desperate effort to escape the legal consequences of the due receipt of this report by the appellee, the complaint is now made that this report, though stating all of the germane facts, omitted to state the actual price paid by Mr. Noyes when he purchased Section 5; and we suppose that if this report had disclosed that amount, it would then be objected that no disclosure was made of the particular legal tender through which the purchase was made, whether gold, silver, currency, or what not. No claim is anywhere made by this appellee that he ever attempted to ascertain what the purchase of Section 5 cost Mr. Noyes; he does swear that he desired to ascertain from Osborn and Peat for what sum the section had been offered to the company, although he does not swear that he prosecuted his inquiries any further than Osborn or Peat, and indeed refused to go to the office of Mr. Noyes for the purpose of obtaining the information that he desired (586-7). And since the annual report of 1913 plainly declared that Section 5 was purchased by Mr. Noyes, and since no effort is disclosed by this record to have been made by this appellee to ascertain the cost of that section to Mr. Noyes, we think it comes with an ill grace from this appellee, at this late day, to complain that this report omitted to state a fact which he himself never so much as turned a finger to ascertain. He was informed that the section was purchased by Mr. Noyes; no fact in this record can justify the statement that Mr. Noyes ever, at any time or place, or from any person whomsoever, concealed the amount which he paid to secure Section 5; and there is no fact which repels the contention that if this appellee had followed up the information given to

him by the report, he would have failed to have ascertained the cost of the section to Mr. Noyes. Never before, so far as we are advised, whether in the pleadings in this cause or anywhere in the testimony has any complaint been made that the annual report of 1913 failed to disclose the purchase price of Section 5 to Mr. Noyes; and we denounce the complaint now made as the merest sham of an afterthought, conjured up by the pressure and exigencies of the cause.

Another purely verbal criticism of the annual report of 1913, appears on page 124 of the appellee's brief, and there much is sought to be made of the fact that the report reads, "early in 1913, Section 5, adjoining the Presidio Mine was on the market for sale"; and it seems that this statement that "early in 1913", Section 5 was on the market for sale, is indicative of some deep, dark, mysterious act upon the part of Mr. Noyes. We know, of course, that the Lewisohn option expired in November, 1912, and that upon learning this, Mr. Noyes, after calling to the attention of the principal stockholders the fact that the section was for sale, after urging them, without success, to the policy of acquiring that section for the company, and after having failed in this regard, expressed his intention of acquiring the property himself, and commenced his negotiations for its acquisition. These negotiations ran along through 1912 and 1913, and it was not until May, 1913, that he finally secured the deed to the property. In January, 1913, he had not yet acquired all of the shares of the Silver Hill Mill and Mining Company, the then owner and holder of Section 5; on January 25, 1913,

he had paid for all of the 1500 outstanding shares except 256 shares; of these remaining shares, 252 were paid for in March, 1913, and the final four shares were paid for in April, 1913; and as we have already suggested, it was not until May 26, 1913, that he finally obtained the deed to the section (706-709). How, we may ask, bearing in mind all of the facts, can any reasonable person profess, with a decent degree of seriousness, to have been misled by the use of the expression "early in 1913"? What sort or character of detriment was occasioned this appellee, or the Presidio Mining Company, by the expression "early in 1913" contained in this annual report? Upon what fantastic theory is a charge of fraud claimed to be established by the use of the expression "early in 1913" in this report? The contention of this appellee in this regard is, we submit, childish to the last degree—as childish as the remainder of the criticisms contained on pages 124-5 of this appellee's brief.

On page 127 of appellee's brief the proposition that, at the time of the acquisition of Section 5, the Presidio Mining Company had no right, title, interest, estate or expectancy in that section, seems to be, as it must be, conceded and surrendered; but the attempted answer sought to be made thereto is no answer whatever. If the Presidio Mining Company had no right, title, interest, estate or expectancy in Section 5, under what duty, then, was Mr. Noyes toward the Presidio Mining Company with reference to the very section in which that company had neither interest nor expectancy, which would inhibit him from becoming a purchaser of that section? If no relation existed between the Presidio Mining Company and Section 5 at the time of its acqui-

sition by Mr. Noyes, what was there, in law, equity or morals, to restrain him from becoming a purchaser of that property if he desired to do so? The appellee's brief is very free with the expression "confidential agent"; but was Mr. Noyes the confidential agent of the Presidio Mining Company as to a tract of land in which that company had no right, no title, no interest, no estate, or no expectancy? While the brief for the appellee is liberally bespangled with the expression "confidential agent", yet it is significantly silent as to any claim that Mr. Noyes was anybody's confidential agent in so far as this unrelated section was concerned. And if there were no relation between the company and the section, if this company had no rights or expectancy in that section, what right had that company to any disclosure by Mr. Noyes of any information in his possession concerning that section, assuming he had any particular information in his possession concerning that section? When one speaks, as this appellee speaks, of concealing facts, the implication is that the person or company from which the facts have been concealed was a person or company who had some right to be advised concerning the facts concealed; but where, as here, the company was totally unrelated to the section, the legal conception of concealment effects no entry into the situation. And of what use in this discussion is the rather flamboyant expression that Mr. Noyes "betrayed and used his knowledge of the property gained through the company's service". If this means anything, it must mean that he betrayed the Presidio Mining Company in acquiring Section 5; but if the Presidio Mining Company had no right, title, interest, estate or expectancy in that

section, upon what foundation is this pretended betrayal to be based? The very thought of a betrayal implies some right or expectancy in the victim of the betrayal; but what right or expectancy had this Presidio Mining Company in Section 5 at the time of its acquisition by Mr. Noyes? And equally idle is the reference to "knowledge of the property gained through the company's service". Unless some duty were owing the company by Mr. Noyes concerning Section 5, which duty, in its turn, would rest upon, or grow out of, some interest or expectancy of the company in the section in question, the user by him of any knowledge of Section 5, whether gained through the company's service, or otherwise, could furnish neither the company nor its stockholders any ground for complaint, because, absent the duty resting upon the right or expectancy, no breach of duty could be traceable to such user of such knowledge. As remarked in the Lagarde case:

> "Proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes' purchase in any way impaired the value of the corporation's property. In such case it is immaterial that knowledge of the situation was gained by the Lagardes through their connection with the corporation, since no breach of duty is traceable to such knowledge. The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purpose of its creation. * * * Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments, which, though

> capable of profit to the corporation, have in no way become subjects of their trust or duty."
>
> *Lagarde v. Anniston Lime Co.,* 28 So. (Ala.) 199, 201-2.

And see a relevant analogy from the law of partnership, in *Wheeler v. Sage,* 68 U. S. (1 Wall.) 518, where Mr. Justice Davis points out that

> "each partner is the agent of copartners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged, there is no restraint upon his right of traffic";

and see this decision quoted and approved in *McKenzie v. Dickinson,* 43 Cal. 119, holding that the obligations of co-partners refer only to the conduct of the actual business in which the firm is engaged, and that beyond and outside of such business there is no restraint upon the right of either party to traffic for his own profit; and see, also, the principle of these cases applied in *Latta v. Kilbourne,* 150 U. S. 524, 550. In a word, the dealings between Mr. Noyes and the Silver Hill Company were not within any duty he owed to the Presidio Mining Company, or within any trust relation between him and the Presidio Mining Company; and since the Presidio Mining Company had no right, title, interest, estate or expectancy in Section 5, it could have had no right or claim against Mr. Noyes in respect of that section which could in any maner or to any degree prevent him from becoming a purchaser thereof.

The claims of the appellee in the respects just criticised, are repeated at various places throughout his

brief, as will be observed upon reading that document; but we think that those claims, however frequent, are adequately met by the discussion contained in our opening brief and in this reply brief.

INTERESTED LOANERS OF MONEY:

> **Where the acts of men are fairly open to two constructions, the one favoring fair and honest dealing, and the other favoring corrupt or oppressive practice, the former will be accepted and the latter rejected.**

It is a familiar principle, founded upon the accumulated experience of judges, legislators and the general course of human history that men are honest rather than dishonest, and that private transactions are fair and regular, rather than the reverse; and this criterion is recognized by all authorities, state and federal, and is incorporated into the California Code of Evidence, in Section 1963, Subdivisions 1, 19, 20, 28 and 33. Nothing, indeed, could well be more misleading than to look with icteric eyes at that human nature which "constitutes a part of the evidence in every case" (*Green v. Harris,* 11 R. I. 5), and which "is something whose action can never be ignored in the courts" (*Louisville Trust Co. v. Louisville Ry.,* 174 U. S. 688), and to attempt to reason about that human nature upon the theory that the only motives of human conduct are those which impel men to oppress and despoil others, as if they were the only motives by which men could possibly be influenced. Why, we ask, should this case be sought to be disposed of by putting all the weights into one of the scales, by assuming that the only motive by which men are influenced is the will to opress and despoil, and by attempting to reason as if no human

being had ever sympathized with the desires, hopes or feelings, or been gratified by the thanks, of a fellow man? But who, we ask again, will seriously dispute the proposition that in actions going upon fraud, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing? (*Ryder v. Bamberger,* 172 Cal. 791.)

This thought was suggested to us in looking over this appellee's brief, wherein he claims that Mr. Noyes obtained the loans which enabled him to purchase Section 5, because of selfish hopes on the part of the lenders of the money of future business with the Presidio Mining Company. This suggestion is made at various places in the appellee's brief, and perhaps as fair a type of these statements as could be selected will be found upon page 144 of the appellee's brief, where the claim is made that

> "the money used in purchasing said property (Section 5) came from interested parties who were the company's beneficiaries:
>
> (a) Benton Bowers the contractor hauling freight and furnishing wood to the company;
>
> (b) The Marfa National Bank which benefited by the change in the bank account, its $10,000 loan to Noyes being secured by Presidio Mining Company's stock and the endorsement of William Cleveland, its director, anxious to get business for the bank;
>
> (c) Harry Young, the Shafter storekeeper, who would participate in the continued prosperity of the company."

We repudiate the imputation that any one of these men was an "interested party" in these transactions in any sinister sense, and we insist that any fair reference to this record will demonstrate the absence of any evidence of illegitimate or improper interest by these men; but, suppose that they were "interested parties", what of it? Certainly, their interest was not aroused by the prosperous condition of the company at that time; they, being upon the ground, were as familiar as the rest of the Presidio Mining Company world with the plight of the company at that time; and there was nothing in or about the then condition of the company's affairs which could have influenced them to advance to it any moneys whatever. In a word, the company itself was not a factor, and could not have been a factor, in developing these loans. On the trial below, Harry Young was not a witness and there was no personal evidence from him as to the motives which actuated him in these transactions. At the trial below, Benton Bowers was a witness and, while it appeared that he had been doing hauling for the company, yet no inquiry was made as to the specific motive which controlled his conduct, although it did appear that he was an old friend of Mr. Noyes. During the trial below, Mr. Cleveland was a witness, and testified that "in 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security" (904); and in our opening brief, we endeavor to make clear, in this connection, that the controlling consideration which induced the Marfa National Bank to make this loan to Mr. Noyes was, not the Presidio Mining

Company stock, because that was no security, but the endorsement of Mr. Cleveland's name upon Mr. Noyes' note,—a view of the situation which is fortified by the statement of Mr. Cleveland, at the bottom of page 902, to the effect that the bank "wanted some security, so I went on the note with Mr. Noyes at the bank; the bank required an endorser"; and the conditions revealed by this testimony would be without reason or necessity if, as suggested by this appellee, the Presidio Mining Company's stock was the efficient security upon which the loan was made, or if the credit of that company were as exalted as appellee claims it to have been.

The loan from the Marfa National Bank to Mr. Noyes antedated the transfer of the bank account of the company from the San Antonio Bank to the Marfa National Bank. Reference to any authentic map of the State of Texas (*Brown v. Piper,* 91 U. S. 37) will make it clear that while Marfa is but a comparatively short distance from Shafter, San Antonio is probably as far from Shafter as Los Angeles is from San Francisco; and a sufficient reason for the transfer of this account to a readily accessible bank can be found in the proximity of the Marfa National Bank. It would be as irrational for the company to do its banking at San Antonio, with the Marfa National Bank within easy distance, as it would be for a San Francisco merchant to do his banking at Los Angeles with the San Francisco banks within easy reach; and this natural and reasonable view of this matter should, upon all principles of interpretation in this class of cases, be accepted, rather than one which would impute without reason the presence of irregular motives.

We have asked the question, assuming that these moneys were loaned to Mr. Noyes by these parties from interested motives, what of it? But it must not be assumed from this that we concede that these loans were made from interested motives, or from improperly interested motives. Mr. Bowers and Mr. Noyes, like Mr. Cleveland and Mr. Noyes, had been friends for very many years, and both Mr. Bowers and Mr. Cleveland had ample opportunities during these years to study Mr. Noyes' characteristics; and the circumstance that each of these men was familiar with the deplorable condition of the company in the winter of 1912, but nevertheless were ready and willing to make these loans to Mr. Noyes, certainly reflects no discredit upon either party to the transaction, and furnishes an explanatory motive therefor.

So far as Mr. Young is concerned, it may be remarked that throughout the trial and throughout the appellee's brief, we have heard so much of the Gleim Company and its relations with the Presidio Mining Company that the reference to the Young business house comes with something of a surprise; and we are not aware from the declarations of this record, either, that during the past Harry Young participated in the business of the company to any appreciable extent, or that during the dealings between him and Mr. Noyes in the winter of 1912-13 any arrangement was made either for the suppression of the Gleim Company or for any additional participation by Mr. Young in the business of the company; and it may further be added that Mr. Young made no loan of any money to Mr. Noyes. Harry Young was the principal individual owner of the stock

of the Silver Hill Mill and Mining Company and he sold his stock to Mr. Noyes for $10,000, Mr. Noyes paying him $5,000 and giving him his note for the remaining $5,000 (683-4); and this was the length and breadth of the transactions between Mr. Noyes and Mr. Young. What there was in all of this to fasten the imputation of improper motives on these men in these very natural and ordinary transactions, we must confess our inability to understand; and we urge upon the court that no tangible fact is anywhere disclosed which would authorize this appellee in seeking to impress upon these transactions any sinister aspect.

ALLEGED SECTION 5 EXPENSES:

These matters, which are fully explained in the record and opening brief, establish neither the commission of any fraud by Mr. Noyes, nor the acquisition of Section 5 by the Company.

This topic also has been referred to in our opening brief, and it is we think of a character not to detain us long in this place. But, as usual, statements are made in the appellee's brief which, according to our understanding, do not respond to the statements in the record. Thus, on page 7 of appellee's brief, after referring to the business in connection with Mr. Noyes' acquisition of Section 5, the statement is made that

> "all Noyes and Gleim's travel and other expenses were paid by the Presidio Mining Company during these transactions";

and on page 47 it is stated that

> "the expenses incident to examination of the property and sampling were paid by the Presidio Mining Company, and the examinations made and the sampling done by the Presidio Mining Company's employees";

and on pages 136-7, the statement is made that

> "vouchers 14 and 18 and 23 show company expenditures of $433.55, traveling expenses Noyes and Gleim incurred on account of cyanide plant and purchase of Section 5. The assaying was done by paid employees of the Presidio Mining Company. Voucher 19 shows $22.05 paid for telegrams. The company never was reimbursed for any part of said sums";

and, for a final example, it is stated on page 145 that

> "the Presidio Mining Company paid all his own and Gleim's expenses while securing the options on the stock, while acquiring the same and closing the deal, even to the telegrams concerning the acquisition of said Section 5".

The difficulty with these references is that they do not fairly reflect the disclosures of the transcript, and are therefore misleading. So far as the statement is concerned above quoted from page 7 of the appellee's brief, we are at a loss to understand what the passage means, and where in the transcript in evidence can be found any support of the statement made. So with the statement quoted from page 47: we know of no voucher or other document, or testimony contained in this record which supports the proposition that the expenses incident to examination of the property were paid by the Presidio Mining Company. We believe that there is evidence in the record that the Presidio Mining Company took samples from Section 5, but it would naturally sample the ore that it intended to work whoever might have been the owner of the ore. The same criticism applies to the passage quoted from pages 136-7: there, the effort is made to convey the impression that the company expended $433.55 for investigating Section 5, whereas the testimony clearly shows that the trip of

Mr. Noyes to Texas was necessary to arrange for and start the construction of the new cyanide plant, and that no money was expended in making the arrangements for the purchase of Section 5. This is true, also, of the $22.05 spent for telegrams; there is no proof whatever, anywhere in the record to differentiate this item from any other of the monthly petty cash items of the general business of the company; and certainly, there is no evidence whatever connecting this item for telegrams with the acquisition of Section 5. On the contrary, the only testimony upon this subject which we can recall indicates that "those telegrams cover business of the cyanide plant and that Osborn shortage" (764). All of these criticisms are equally true of the passage above quoted from page 145 of the appellee's brief. We think, and submit for careful consideration by the court that the testimony of Mr. Gleim in connection with these matters (799-800), makes it very plain indeed that this appellee has no just ground for criticism in the present respect; and if he has established no case of fraud otherwise, he has certainly established none through the medium of these particular items.

KNOWLEDGE OF MR. NOYES AND MR. GLEIM CONCERNING SECTION 5:

The evidence in this cause fails to invest either Mr. Noyes or Mr. Gleim with any special or peculiar knowledge of Section 5: from 1897 to 1912, neither had visited the section upon any occasion disclosed in the testimony; and in 1912, Mr. Noyes did no more than make a limited examination of a single ore body, Stope 13 (749).

In the appellee's brief, speaking of Mr. Noyes, it is stated on page 112 that

> "the history of both sections (8 and 5) was well known to William S. Noyes, as he had operated Section 8 for 29 years in December, 1912, and Section 5 for many years as well, and during the period of operation of both parties, the ores from both sections were treated in the one mill, likewise under the direction of William S. Noyes".

But when we turn to the record to ascertain exactly what was Mr. Noyes' antecedent relationship with Section 5, we learn that many years before, and prior to 1897, the Cibolo Company had been operating in Section 5, having its milling done by the Presidio Company; in 1897, the Cibolo Company gave up its lease and ceased to operate the property (1059); and from 1897 down to December, 1912, there is no proof whatever that Mr. Noyes had any relations whatever with Section 5, or even visited it, or had any other knowledge of or concerning it than this, that the Lewisohn engineers made such a report to their principal that he rejected the purchase of the property. This statement is confirmed by the testimony of Mr. Noyes who states on page 246 of the record that

> "while I was living down in Texas I had charge of the Cibolo Creek Mill and Mining Company which operated at one time Section 5 under my supervision. I operated Section 5 for some years as well as Section 8. I was pretty familiar with the ground *at that time*, and the location of the ore bodies *that were known*";

and also by the following statement by Mr. Noyes on page 686 of the record, dealing with Section 5 when Mr. Noyes entered it during the last days of December, 1912:

> "I found Section 5 just as I had left it in 1897, when I closed it down for the Cibolo Creek Mill and Mining Company, with the exception that the engineers that had been examining it for the New York people had run two

> drifts, and opened up a new pocket of ore which had not existed when I left the mine, or was not known when I left the mine."

The foregoing illustrates the extent and scope of Mr. Noyes' acquaintance with Section 5 in December, 1912; and we submit that it scarcely supports the statement made on page 140 of appellee's brief that "Mr. Noyes was the only person thoroughly familiar with Sections 5 and 8". And it may be asked why, if Mr. Noyes were "thoroughly familiar" with Section 5, he should find it necessary to examine that property and "satisfy himself it was worth the money before paying the purchase price", as is affirmed on page 47 of the appellee's brief? And so far as Mr. Gleim is concerned, Mr. Noyes tells us that he reached Shafter on the night before Christmas, 1912, "and then the next one or two days, I took a look through the Silver Hill Mine. Mr. Edgar M. Gleim accompanied me" (685-6); and so far as the evidence in the cause advises us, this was the first occasion during his lifetime when Mr. Gleim ever visited at Section 5, as we interpret the testimony. Thus, at page 567, speaking of the occasion when he and Mr. Noyes entered Section 5, Mr. Gleim stated,

> "we went into Section 5 to see if the people who had been prospecting the section there, had turned it down, had developed anything we did not already know. We found the mine practically the same as the Presidio Mining Company had left it, with the exception of drill holes put by the Lewisohn Bros. and with the exception of a small prospect in the bottom of one particular stope, it was the stope which we afterwards named Stope 13, which is the stope which is at the present time called Stope D";

and at page 801, Mr. Gleim merely states that

> "I was in charge of the mine in the months of January, February, March and April, 1913, about or prior to that time, I visited Section 5 with Mr. Noyes";

and so far as we can discover these are the only passages in the record throwing any light on Mr. Gleim's first visit to Section 5. In this connection it may be pointed out that the claim of the appellee, with reference to Mr. Gleim's knowledge concerning Section 5, goes no further than to state that

> "at that time (November, 1912) E. M. Gleim was thoroughly familiar with recent developments in Section 5, by engineers exploring and developing it" (brief, pages 130-131),

a phase of the matter which will presently be referred to again. Upon the whole, then, we see no reason for enlarging the alleged knowledge of either of these witnesses beyond that disclosed by a fair construction of their testimony.

THE ORE BODY IN SECTION 5:

> **"No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out * * * It is, in the nature of the thing, utterly speculative; and everyone knows the business is of the most fluctuating and hazardous character" (Tuck v. Downing, 76 Ill., 71, 94; approved in So. Dev. Co. v. Silva, 125 U. S. 247). "The quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mechanical or even with approximate certainty. The opinions of expert miners, on a question of this kind might reasonable differ quite materially" (So. Dev. Co. vs. Silva, 125 U. S. 247; Richardson v. Lowe, 149 Fed. 625, 634).**

In our opening brief, we had occasion to make some remarks concerning the characteristics of the ore encoun-

tered in the mining property involved in this action; we pointed out that the property is what is known as a pocket mine, the ore bodies consisting of replacement deposits in limestone which are extremely irregular, both as to quantity and quality; and that any attempt to judge from exterior indications as to either the quantity or the value of a face of ore in sight, would be the merest conjecture. These statements were, of course, based upon the testimony of Mr. Noyes and Mr. Gleim. But in dealing with this topic, the appellee takes the position that when Mr. Noyes and Mr. Gleim visited Section 5 upon the occasion just hereinabove referred to, and examined the ore bodies,

> "they ascertained that there were from 10,000 to 20,000 tons available in the new body alone uncovered by the Lewisohn engineers; assays made show 45 oz. of silver to the ton. The ore body was estimated to be worth from $100,000 to $400,000. Noyes testified that from his experience the mine always produced two or more times as much ore as could be measured" (brief, p. 131);

and the same thought is stated at pages 120-1 of the brief in the following language,

> "the examination in December, 1912, of said property, after tying up the Silver Hill stock, made by both Gleim and Noyes, thoroughly satisfied both said last named as the officers of the company what the possibilities with Section 5 were in conjunction with the equipped mine and mill of the Presidio Mining Company. There was no conjecture about it, for they had a body of ore worth from $100,000 to $400,000. With a plant to treat the same, the results were certain. There was nothing conjectural about it".

But, speaking of this body of ore, Mr. Noyes makes it very clear that he was not describing its extent or assay value with any degree of absolute finality. He

explains, at page 686, that the Lewisohn engineers had run two drifts and opened up "a new pocket of ore" which was not known when he was last in the mine. He then states that "we ascertained the possible extent of that body of ore as much as we could", plainly dealing in such possibilities as presented themselves under the existing circumstances. He then makes an estimate, "guessing roughly" at the extent of the exposure of the ore, and

> "I made a rough guess that it might contain anywhere from ten thousand to twenty thousand tons of ore, depending upon the outline of the ore body, which in those pockets of limestone is very largely conjectural";

and he then hazards a conjecture as to the probable contents of the ore, saying

> "I suppose about forty ounces per ton were the probable contents of that ore."

And on page 749, Mr. Noyes advises us that

> "the only ore body that I examined in Section 5 before paying for it or for the stock of Section 5 was that Stope 13, and that examination was necessarily confined to looking at these two drifts and the winze."

In this connection, attention may be directed to the quotation at the bottom of page 121, from Mr. Noyes' report to Mr. Boyd, dated February 16, 1907. It will be remembered that, having in mind the betterment of this company, Mr. Noyes in 1907 urged the installation at that early period of a cyanide plant; and it was in furtherance of this project that he wrote the report from which this quotation is made. Passing by the circumstance that the quotation as given in appellee's brief does not in our opinion properly reflect the report in question,

it is to be observed that this report had nothing whatever to do with Section 5, and was limited to the company's own mine, Section 8; but since wide differences within restricted areas of ore productivity is not an uncommon thing in mining, since it is not shown that the two sections were equivalent in the character and quality of their ore, and since the record in the present cause of itself exhibits those marked fluctuations between Section 8 and Section 5 so common in mining history, we fail to appreciate just how Mr. Noyes' comments upon Section 8 in 1907, can throw any light upon the productivity of Section 5—we know of no evidence in this record establishing as to Section 5, "that it has always yielded two or more times as much ore as could be actually measured".

Further light is thrown upon this matter by the testimony of Mr. Gleim. In the "control the management" letter from Overton to Gleim, written three days after the present suit was commenced, Overton describes Gleim as "an honorable and efficient official" who "is excluded in my complaint of the management"; in the appellee's brief (pages 130-1), the statement is made, speaking of November, 1912, that "at that time E. M. Gleim was thoroughly familiar with recent developments in Section 5 by engineers exploring and developing it"; and it is, therefore, of some interest to ascertain the judgment of this "honorable and efficient official" who "was thoroughly familiar with recent developments in Section 5". When, therefore, we turn to the testimony of Mr. Gleim, we find that he visited Section 5 with Mr. Noyes.

"At that time, we found in the bottom of Section 5 that place (Stope 13, or as it is now called Stope D), and that was the only one of any importance that was opened up. It looked very favorable to us. We made a rough estimate of the total number of tons that we thought would be in that stope approximately; we figured that there was anywhere from ten thousand to twenty thousand tons of ore exposed—not blocked out, however,—because that was impossible."

He then goes on to give his estimate as to what the estimated number of tons would be worth, following which, he was asked:

"Q. You did ascertain, then, that it was a body of ore that was worth approximately $100,000, in Section 5, and which you were able to check up in this particular stope 13?

A. No, sir. I did not say that was worth $100,000—$100,000 gross recovery."

He then goes on to explain that there was $100,000 worth of ore according to his estimate, the net value of which would be the difference between $100,000, and the cost of mining and of extraction, whatever that cost might be. He said he thought the net result would be favorable, as it was high grade ore, and then proceeded to say:

"That body of high grade ore we found would have been of no value by itself. Its main value lay in the fact that we could use it to grade up the low grade material which we knew was standing in the mine, and which was absolutely of no value by the pan-amalgamation process. It was very doubtful if there was enough ore in Section 5 to justify a metallurgical plant. That is why the property was turned down by the people who had previously examined it."

Thereafter, during his cross-examination, the following occurred:

"The ore bodies in both Section 8 and Section 5 are replacement deposits in limestone. They are extremely irregular, and there is no way of blocking them out. They are just as irregular in value, as they are in quantity. You simply have to base an estimate on your experience, and make a guess. When I made a guess that the ore body contained from 10,000 to 20,000 tons, the conditions were such that I could not absolutely say that it contained at least 10,000 tons—absolutely not at all; it was an estimate of a minimum of 10,000 tons, and a maximum of 20,000 tons. That was determined by making what we call an assay plan, taking what you think is reasonable for the extension of the ore into the country rock, and then making your estimate of the tonnage.

The COURT. I do not think you need to go into that, because I understand that the testimony of the witness in chief was that it was a mere estimate based upon his experience and observation in working deposits of that character.

Mr. HARDING. I want to show that after all there may have been 5,000 tons or 50,000 tons.

The COURT. Certainly. That deduction may be drawn from the evidence as it stands. There is no use in taking up the time to cross on a matter of that kind. It was sufficient to induce you as a miner, and Mr. Noyes as well, to come to the conclusion that Section 5 would be a valuable acquisition.

The WITNESS. A. Yes, that it had some highgrade ore, which was something we have to have, having the lowgrade bodies we did have; we had to take a chance; it was just simply a chance; it was because we could not block out the ore bodies."

Taking this testimony as a whole, we respectfully submit that it supports our views as to the purely speculative character of any such conjecture as that referred to in the testimony just quoted; and we submit further that this testimony itself, fairly read and fairly interpreted, formulates nothing further than a conjectural

opinion upon the part of these witnesses. It is common knowledge that

> "there is no class of property more subject to sudden and violent fluctuations of value than mining lands".

Patterson v. Hewitt, 195 U. S. 309-320-321; and it is equally clear that, as observed in *Tuck v. Downing,* 76 Ill. 71-94,

> "no man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. * * * It is, in the nature of things, utterly speculative and everyone knows the business is of the most fluctuating and hazardous character".

Speaking upon this subject in a silver mine case, the Supreme Court of the United States points out that

> "the quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mechanical, or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially".

The court then goes on to observe:

> "In the case of Tuck v. Downing, 76 Ill. 71, 94, the court says: 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative; and everyone knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop.' "
>
> *Southern Develop. Co. v. Silva,* 125 U. S. 247.

And when this same subject matter came on for consideration before the Circuit Court of Appeals for the Eighth Circuit, that learned court observed, speaking of mining property:

> "This property, from its nature, is of doubtful and uncertain value. No one can peer into the bowels of the earth and tell us with accuracy what is found there. It is so difficult to determine even the quantity and value of ore in sight that the Supreme Court in Southern Development Co. v. Silva, 125 U. S. 247, 252, 8 Sup. Ct. 883, 31 L. Ed. 678, says:
>
> 'It is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.'
>
> These observations are made by the Supreme Court concerning an estimate of ore actually 'in sight' as that term is understood among miners. But that court in the same case goes further, and, quoting with approval from Tuck v. Downing, 76 Ill. 71, 94, says:
>
> 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of things, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop.'
>
> From such approved reflections concerning the character of the property, which defendants purchased, and which we are now asked to say was worth less than they paid for it we find that we are dealing with a subject uncertain in actual value, and which, from the speculative feature involved in dealing in it, becomes almost impossible to accurately value."

Richardson v. Lowe, 149 Fed. 625, 634.

THE FINANCIAL ABILITY AND CREDIT OF THE COMPANY:

> **During 1912-13, a local (Marfa) banker would not have loaned money to this Company without additional security: during 1913, a local (San Francisco) bank refused to loan the Company needed sums without the personal guaranty of those now accused of looting the Company, and that guaranty was given by them: during 1913-14, this Company was compelled to accept a loan of Ten Thousand Dollars from the man now accused of pillaging it: the credit upon which the cyanide plant was installed was procured by the man now charged with wrecking the Company; and as to Section 5, the Company formally admitted in writing the otherwise established fact of its financial inability.**

At various places throughout appellee's brief, references are made to the credit and general financial position of the company at the time of the acquisition of Section 5; and some forms of these references may be briefly referred to for the purpose of suggesting their scope. On pages 48 and 144, the assertion is made in substance that it was due to the company's credit that Mr. Noyes was able to secure the money with which he purchased Section 5; between pages 86 and 89, a labored effort is made to support the claim that the company was prosperous; at page 104, the claim is made that the company was in good financial condition; and on page 119, large claims are made for the credit and financial standing of the company. In our opening brief, we have discussed this phase of the case. We pointed out that by reason of low grade ores, depreciated market price for silver, and high cost of extraction, the situation of the company became so desperate in 1907 that the directors were constrained to order the mine closed down and the employees discharged. We pointed out that between 1907 and 1912, the company was barely

able to keep its head above water, earning only in round numbers about thirty thousand dollars, over one-half of which went into an internal combustion engine, and the balance into needed improvements at the plant at Shafter. We pointed out that the conditions surrounding the company were such in 1912 that a change from pan-amalgamation to cyanide had become imperative. We pointed out that the condition of the company, as reflected in the conduct of its stockholders was such that during 1908 over 100,000 shares of the capital stock changed hands, that the donor of the appellee's stock had "lost confidence", and had transferred out of his own name and into the names of others 16,000 out of 17,000 shares of stock. We pointed out that when the establishment of the cyanide plant became imperative, it was through the influence and friends of Mr. Noyes that the credits were obtained which enabled that plant to be installed; no pretense is made that Overton or Martin or any other stockholder went to the foundry at El Paso to obtain time or credit. We pointed out that the peculations of Osborn had so depleted the company's treasury that in December, 1912, it did not have more than five or six thousand dollars. We pointed out that, indispensable as was the cyanide plant, the company had no fund with which to install it, nor did the stockholders ever contribute a single dollar for that purpose. We pointed out that this company in its own minutes confessed its financial inability to purchase Section 5, and we asked why, if Section 5 were so necessary to this company, and if it had either the cash or the credit with which to acquire that section, it so utterly failed to do so. We pointed out that in January, 1914, this company

was compelled to and did borrow $10,000 from the very man who is now being accused in this litigation. And we pointed out that so magnificent was the credit of this company that its San Francisco Bank refused to make necessary loans to it until the personal guaranty had been given of the very people that it is now claimed were looting and pillaging the company. These things cannot be fairly contested; they are writ large upon the face of this record; and we submit that when all of the facts and circumstances surrounding this company during 1912 and 1913 are considered, full justification will be found for the testimony of the director of the Marfa National Bank who declared that

> "in 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security" (p. 904).

THE FINANCIAL POSITION OF WILLIAM S. NOYES IN 1912-13:

> **During the period of time relevant here, not only did Mr. Noyes have an account with his New York bankers and real estate in New York City, but his financial standing was such that he was able to acquire Section 5, obtain the credits which permitted the installation of an $80,000 cyanide plant, and be acceptable, with others, as a personal guarantor to a San Francisco bank of loans made by it to the Presidio Mining Company.**

At various places throughout his brief, the appellee favors us with his views as to the financial condition of Mr. Noyes during 1912-13. And perhaps as concrete an illustration as any of the position of the appellee upon this topic will be found on pages 106-7 of his brief in the sentence

> "his financial condition was such that it was an impossibility for him to borrow money on his own credit with

which to either acquire Section 5 for himself or operate it after he had acquired the same";

and it is in this connection that the appellee, referring to an allegation in the answer of William S. Noyes makes the statement that "he had no ready money of his own in December, 1912" (page 106 of appellee's brief). With reference to this last statement, what was really said in Mr. Noyes' answer was the following:

> "This defendant denies that immediately prior to December, 1912, and during the period when he was securing an option to purchase said Section 5, and thereafter, during the period when he was paying for said property, that he was without means of his own to purchase said property; admits that at said time he was without ready money with which to purchase said property, and was compelled and did borrow the money required for said purchase, and this defendant further avers that he was not aided in the purchase of the capital stock of said Silver Hill Mill and Mining Company, financially or otherwise, by said Presidio Mining Company, or any of its directors. This defendant denies that he could not have obtained the funds with which to pay for said Section 5, except with his relation to said Presidio Mining Company;"

and in connection with this allegation, we wish to point out that what is there stated is in no way any impeachment of Mr. Noyes' financial condition at the time in question,—indeed, the Court of Appeals of New York recognized, what was not true of Mr. Noyes, that a man may even be "financially embarrassed" and still be possessed of abundant property (*Jacobs v. Morrison*, 136 N. Y. 101). And the ineptitude of this criticism of Mr. Noyes' financial position may be illustrated by the facts that not only did Mr. Noyes have money and stocks with Herzog and Glazier, the banking house in New York City, whose correspondent was J. Barth and Company,

of San Francisco, not only did he have real estate in New York City, and not only did he have stocks in other companies in California, but he had such an assured position that Mr. Cleveland was quite content to go upon his note to the Marfa National Bank for $10,000, and the El Paso Foundry Company and Gleim & Company, and others, were content to give credit to the Presidio Mining Company upon Mr. Noyes' assurances, but also, when the Presidio Mining Company was at its wit's end for money and credit, it was the Wells Fargo Nevada National Bank which made it loans *upon the faith of a guaranty signed by Mr. Noyes and others.* And not only was he in a position to obtain without difficulty the funds necessary for the purchase of Section 5, not only was he in a position to procure credits for a company itself without credit, but even after he had assisted the company by personally obligating himself to the Wells Fargo Nevada National Bank, he actually made a loan to the Presidio Mining Company of $10,000 in January, 1914. As illustrative at once of the financial position of Mr. Noyes and of the lack of credit of the Presidio Mining Company, reference may be made to the facts detailed in the following excerpt of the testimony of Mr. Noyes, facts which, knowing what we know of the history of this enterprise, are intrinsically reasonable, and facts which were subject to swift and easy contradiction if they had not been truthful:

> "Q. In regard to the conditions under which you entered into the agreement with the company in the manner that you have described, to divide the net profits, fifty-fifty, was there any statement or promise made by you that the company might at any time buy Section 5 when it was in

a financial position to do so, or wished to do so, or could do so?

A. I told them that many times in conversation; that was a part of the conversation that took place when this agreement was made between Mrs. Willis, Miss Doherty and Mr. Osborn. When I purchased Section 5 in the manner in which I have described, I had not any assurance from the Presidio Mining Company that it would take it off my hands at the price at which I bought it, or at any other price. When I returned here, after I had purchased the stock of the Silver Hill Mill and Mining Company, the Presidio Mining Company was not in a financial position to take it off of my hands. As to what was the credit of the Presidio Mining Company as far as its ability went to borrow money at that time, I only know as far as we made efforts; we could not get any money. We tried to borrow money from the Wells Fargo National Bank, with which we had done business for thirty years; they would not loan us any. When I did obtain a loan I got it from my friends in Texas on my assurance to them that the property would pull out and pay the loans. In regard to the loans for the Presidio Mining Company for which we applied to the Wells Fargo Nevada National Bank, and they declined to loan the company anything. Mr. Osborn made the application; he showed me their reply or wrote me their reply; and they would not loan over $2,500 which was worse than nothing to us at the time. Later on, I borrowed money on behalf of the Presidio Mining Company; we got a loan; I have forgotten how much it was; five or ten thousand dollars—I think it was $5,000; and as to the security given for that loan, Mrs. Willis, my brother, myself and Mr. Osborn, joined in a guaranty up to $10,000. As to the prevailing rate of interest for individual loans is ten per cent there now."

We submit that when all of the facts in this cause are considered, this court will have no more difficulty in acceding to the good financial position of William S. Noyes, than did Mr. Bowers, or the Marfa National Bank, or the Wells Fargo Nevada National Bank, or

any of the firms or corporations who assisted this company with credits upon their faith in the character and financial standing of William S. Noyes.

FAILURE OF APPELLEE TO TRACE FUNDS OF THE PRESIDIO MINING COMPANY INTO THE PURCHASE PRICE OF SECTION FIVE:

> The conspicuous and complete failure of appellee to establish "that the notes themselves which he (Mr. Noyes) gave, from which these moneys were paid (as the purchase price of Section 5), were not paid until a year or a year and a half thereafter that particular period, and the moneys were taken from the corporation", illustrates the futility of appellee's "whole contention"; it is as true now as when the original bill came before Judge Dooling, that the appellee's case, to use Judge Dooling's language, "does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company" (39).

In our opening brief we discussed this matter at some length analyzing the facts and presenting the law as determined by the highest court in this country; and we are bold enough to believe that we succeeded in making it clear that none of the funds of the corporation to which the Marfa National Bank would loan no money without additional security, the corporation to which the Wells Fargo Nevada National Bank would loan no money without the personal guaranty of the very people now accused here of fraud, and the corporation which did not hesitate to accept a loan of $10,000 from the very man now accused of looting and pillaging its treasury, were ever traced into the purchase of Section 5; and the response made to this statement is such a nude and ineffectual assertion as, for example, at the foot

of page 145 of appellee's brief where it is said that the moneys of the corporation were ultimately used to repay the very notes given by William S. Noyes (page 145). No attempt is made to analyze the evidence. No attempt is made to collate the relevant authorities; no attempt is made to furnish any real or practical aid in resolving this issue; and all that we are confronted with is vain and empty assertion. Is it, or is it not the law, that the burden rested upon this appellee to establish that the moneys that paid off Mr. Noyes notes were moneys which were taken from the treasury of this treasureless company? Is it, or is it not the law, that in following trust funds, it is not enough that the appellee's evidence be consistent with the theory that Mr. Noyes purchased Section 5 with money taken from the company, but that evidence must also be inconsistent with the theory that the money that paid off these notes came from other sources? Is it, or is it not, the law that if this legal criterion be not satisfied, nothing is proved? And in making these inquiries, for the purpose of illustrating the paucity of this fallacious reply to our position as to this topic, we would not have it understood that there is anything in this record consistent with this appellee's claim; as the discussion in our opening brief will make clear, we repudiate the thought that any such evidence appears in this record. In point of fact, we are convinced that an assertion which fails to go further than mere conjectures, however frequently repeated, is of no assistance to a bench of judges anxious to do that which is right under the law, and desirous of assistance in the performance of that duty by the men at the bar; and speaking for ourselves, we do not think it fair to

hand up a mass of unsupported assertion barren of apt discussion of the facts or the law.

THE LEASE OF JANUARY 25, 1913, THE RESOLUTION OF FEBRUARY 15, 1913, AND THE FINAL CONTRACT OF NOVEMBER 19, 1913:

> These instruments must be considered in the light of the situation in which they were made; they were neither fraudulent in themselves nor productive of detriment to the company; the lease of January 25th, itself a temporary expedient, was so unfair to Mr. Noyes that by common consent it was superseded in ten months by the definitive agreement of November 19th; as to the resolution of February 15th, while Klink-Bean & Co. guardedly declare that "we are also under the impression that the undertaking by the company to pay $45,000 for securing the lease, was neither judicious nor equitable" (an "impression" upon a matter as to which different minds might well entertain different views), but further declare that "although the payment of $45,000 appears to us as excessive, the arrangement has, on the whole, resulted in a benefit to the company," and all this without imputation of fraud, yet the resolution expressly limits the "deferred payments" to "earnings", and the record shows that Mr. Noyes never received more than a fraction of the amount, of which fraction $10,689.75 were returned to the company; and as to the final agreement of November 19th, which definitely settled the rights of the parties in conformity with the general announcement made to all stockholders in the annual report of October 6th, Klink-Bean Co. not only describe that contract as fair, but also declare that it has been fairly carried out.

We find comparatively slight discussion of these three documents in the appellee's brief. The references to the lease of January 25th, are conspicuous for their sparsity. The references to the resolution of February 15, 1913, furnish another illustration of that unreliability which is so marked a feature of the appellee's brief; and the discussion of the final contract of November 19th,

is substantially nil. It is asserted on page 11, of the appellee's brief, that on November 19, 1913, Mr. Noyes "without notice" cancelled the original lease of January 23, 1913; but we do not understand such to be the fact. As we read this transcript, we see the contracting parties themselves coming together as to the final contract of November, 1913. We do not see anything to justify the imputation that it was Mr. Noyes who without notice cancelled that original lease. Of course, as we argued in our opening brief, and produced the facts in support thereof, this lease of January 25th, was undoubtedly most unfair to Mr. Noyes; it originated as a temporary expedient for the purpose of authorizing the company to enter Section 5, and operate there without being denounced as a trespasser, while awaiting until, at a convenient time, a definite agreement settling the rights of all concerned should be made; and this was done on November 19, 1913. Nowhere in this history can be found a fair basis for the claim that the cancellation of the lease was a unilateral act of Mr. Noyes, performed without regard to the rights of those concerned or the existing conditions; and to imply anything of this character is manifestly to distort the disclosures of this record. Just how the resolution of February 15, 1913, came to be adopted, and what was the temporary purpose which it was designed to subserve, are fully explained in the testimony in the cause; and with the terms of this resolution before him and with that testimony at hand, we are at a loss to appreciate how this appellee can make the claim, for example, which appears on page 55 of his brief, to the effect that this resolution "provided for an unconditional payment to him (Mr.

Noyes) of the said sum of $45,000 from the company treasury, and not from any profits from Section 5". We insist that the suggestion of this appellee that the payment of Mr. Noyes' notes, given for the money borrowed to pay for Section 5, was assured under the terms of this resolution which provided for an unconditional payment to him of $45,000, is an unexcusable maltreatment of the terms of that resolution, and of the surrounding circumstances. No one knows the terms of that resolution better than the appellee. No one knows better than he that the resolution contains the condition that the money shall be paid only out of the earnings of the company; no one knows better than he that the reason for the installation of the new cyanide plant was the declining quality of the ore in Section 8 (670, 671, 687); and no one knows better than he that ore of a better quality was immediately required to turn into money to meet the obligations associated with the installation of the new cyanide plant. At the beginning of 1913, the ore from Section 5 was in fact of better grade than that from Section 8 (Klink Bean report, answer to defendant's suggestions 17 and 18 (985). And as a matter of history, between January, 1913, and December, 1915, the company made a profit of over $113,000 from Section 5 (Klink Bean report answer to defendant's suggestion 10 (983), while Section 8 lost money. In other words, as shown by the uncontradicted evidence, the promise to pay Mr. Noyes the $45,000 (a sum by the way which he never received), was hedged about with, and limited by the proviso that the money should be paid from profits only; and in the next place, every dollar that was ever paid him from first to last came

from profits derived from Section 5 ore, and from no other source. At page 766 of the record, the following occurred on cross-examination:

> "Q. You say that the Presidio Mining Company could not buy Section 5; is that a fact?
>
> A. It could not.
>
> Q. At the same time it has paid you $45,000?
>
> A. Out of ore that came out of Section 5, after it came out of Section 5 and had been reduced."

With what degree of patience, then, can a court listen to an accusation of fraud against Mr. Noyes by reason of the resolution of February 15, 1913, when this appellee himself actively seeks to impress upon the court the erroneous belief that the promise to pay Mr. Noyes this $45,000 was unconditional, appellee well knowing, all the while, that payments under the resolution were, by its very terms, to be made by profits only, and that every dollar that was paid to Mr. Noyes came, in fact, out of the profits derived from the ore which came from Section 5 (which section had been paid for from Mr. Noyes' money and from no other source)?

At page 179, after referring to the suggestion that the purchase of Section 5 was a speculative and hazardous enterprise, the question is asked, "if so, why pay $45,000 for a lease on the same"? That Section 5, like any other mining enterprise, was speculative and hazardous we believe, and in that belief we have this comfort that the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, and other courts agree with us. But the evidence shows that while Section 5, like any other mining venture, was conjectural in its ultimate results, yet a pocket of ore had been

located there by the Lewisohn engineers, to which pocket of ore we have hitherto in the course of this reply made reference. At this time, the Presidio Mining Company was carrying a heavy load; it was installing a new cyanide plant, at a cost in round numbers of $80,000; and to meet its obligations, it was necessary that adequate funds should be obtained, and obtained promptly. This was one of the reasons why the lease of January 25, 1913, acquired its importance; and this situation furnishes, without going further, at least one answer to the inquiry of the appellee in his brief. That answer is that it was to the last degree important to the Presidio Mining Company to procure from this pocket in Section 5 some of the $18.57 ore to add to its own $7.70 ore (985), so as to obtain the funds to meet its obligations incidental to the installation of the new cyanide plant; but in all this, it must never be forgotten that any payments made to Mr. Noyes under this resolution were to be payments arising from profits alone, and not otherwise; and therefore it must be plain, in view of the fact that the $7.70 ore of Section 8 was reduced at a cost of $9.51 per ton (985-982), that there could be no profit from there; and if Mr. Noyes did not get his payments out of the profit of Section 5, he would be wholly unable to get any profits at all, until, perhaps, the new cyanide plant should succeed in reducing the cost of production to such a point that the ores from Section 8 would produce a profit. And all of this was well known to the appellee, when he asked this question in his brief.

We find comparatively little comment in this brief upon the ultimate agreement of November 19, 1913; and

we are unable to perceive upon what theory this appellee could criticize the fairness of that contract. We have already, in our opening brief, pointed out the equitable considerations which make for the fairness of that contract; we have pointed out the judgment of the experts appointed by the learned judge of the court below, favoring the fairness of that contract; we have pointed out that in the management of his own farms by this very appellee, he employs precisely the same form of contract (608); and under all these conditions, we do not feel that the contract of November 19, 1913, requires any further defense from us.

THE METHOD OF ASSAYING:

The testimony of Mr. Noyes and Mr. Gleim upon this topic is more than confirmed by the disinterested report of the experts voluntarily appointed and highly commended by the learned judge of the court below.

Something is said in the appellee's brief concerning the method of assaying employed at the mine. At page 114 of appellee's brief, this method is unfortunate enough to be denounced "the pernicious system of false assaying"; at pages 174-176, after some arithmetic, it is stated that the system is wrong; and in connection with this criticism, reference is made to Mr. Lasky and his testimony is summed up in the vague and nebulous proposition that "he testified that the manner of assaying was not susceptible of accuracy". Kiffin, also, is mentioned in this connection, the same Kniffin who is himself a model of inaccuracy upon material matters. We think that any experienced judge of human testimony can hardly fail to read the testimony of these two

men without seeing that they were partisans; and in view of this, we may be pardoned if we prefer the disinterested statements of the Klink Bean report to their prejudiced views. It was a matter of no consequence whatever to Klink Bean and Company, appointees of the learned judge below, which side should prevail in this litigation; that company was highly commended as a firm of experts by the learned judge below, and described as fair-minded; and it was declared that their results were "very close and very correct". When, therefore, we contrast the complaints of this appellee concerning these assays and the mode of sampling at the mine with the results reached by the experts, there is practically nothing left to be said upon this topic. In their report, the experts state that the sampling is carried out in a systematic and practical manner and conforms to the terms of the contract; that the sampling from both mines is done in the same manner and method, and the adjustments made to both properties according to the mine assay percentage; and that over a long period the law of averages should tend to equalize results. They further state that for the purpose of ascertaining more accurate results of assays, weights and reconciling, it would be necessary to maintain an engineering and sampling force costing from five to six thousand dollars per year and increase the cost of mining by reason of separate handling, or build an automatic sampling and weighing plant at an approximate cost of $25,000. They then go into an examination of the mine assays of both Section 5 and Section 8 for the years 1913, 1914 and 1915; and the result was "slightly in favor of No. 8 under the present method". They

further say that not only was the contract of November 19, 1913, fair enough, but it has been fairly carried out; that the methods used for estimating tonnage are in accord with mining practice at similar mines; that the sampling is done in a systematic and practical manner and conforms to the terms of the contract, and that the assaying appartus is good, and the assaying is conducted in a regular, competent and systematic manner (Klink Bean report, *passim*). Here, then, we have the candid report of disinterested outsiders, appointed by the learned judge below, wholly non-partisan and fair-minded men whose results have been judicially commended as "very close and very correct" (964); and under such circumstances we think we may be pardoned if we prefer the conclusions reached by these gentlemen to those of either Lasky or Kniffin.

THE FLUCTUATIONS OF SECTIONS 8 AND 5:

The accidents of mining are ever present in the minds of all concerned in that industry; "everyone knows the business is of the most fluctuating and hazardous character" (Tuck v. Downing, 76 Ill. 71, 94; So. Dev. Co. v. Silva, 125 U. S. 247; Richardson v. Lowe, 149 Fed. 625, 634).

At page 173 of the appellee's brief, the following statement is made,

> "the Klink Bean schedules show that immediately upon his (Mr. Noyes) securing control, Section 8 ore values were forced down, and Section 5 tonnage forced up."

Taking this statement from the appellee's brief for once at its face value, and without stopping to analyze it with any degree of minuteness, does it follow that the depression of Section 8 ores and the elevation of Section

5 tonnage was due to any act upon the part of Mr. Noyes? Is not this a fair sample of the fallacy that we used to read of in our school days commonly known as *"post hoc, ergo propter hoc"*? Why should there be this continuous and unbroken straining after the imputation of dishonesty rather than the fair acceptance of a reasonable explanation consistent with honesty? Speaking upon this topic, Mr. B. S. Noyes remarks:

> "but about November, 1912, the average ore of the Presidio Mine dropped; that is to say, from that time on they got no more of this high-grade ore until lately, within the last six or eight months, since this suit was commenced, or perhaps at about the same time, I should say, speaking from recollection, three months after, we began to get better average assays, and this year within the last four months, the average assays of ore from Section 8 have greatly improved, while those of Section 5 have declined. I account for that by just the accidents of mining; that is always the case in a mine of that sort; the ore goes up and down; it always has done so. The average value of a ton of rock in 1911 and 1912, for example, according to my recollection was in the neighborhood of $10.00; that last two or three years, I think our rock has not averaged more than $7 for the three-year period; and if we had not cut the cost of mining from $9.50 to under $6 there would have been no Presidio Mining Company today" (page 1059).

And this testimony by Mr. Noyes reminds us of the following passage from the opinion of this court in *Cowell v. McMillin,* 177 Fed. 25:

> The fact that the defendant lime corporation apparently lost money between the years 1892 and 1897, and that the Staveless Barrel Company made money during that same time, would be significant if the facts or circumstances showed that the relation of one concern to the other was initiated in fraud, or, after being entered upon, became fraudulent in any way. But they do not. The lime company appears to have saved money in the item of barrels by its

agreement to buy them at 30 cents; and the evidence of its losses in its lime business during the particular years mentioned shows that general business depression obtained at that time and bore heavily upon most commercial enterprises. The general results of the investment to the stockholders in the defendant lime company for the 16 years between 1888 and 1903 show a profit of $290,000 on the original investment of $100,000 and a profit each and every year except during the years of business dullness above mentioned".

THE DOLLAR DIFFERENTIAL:

The allowance or disallowance of one dollar per ton was a matter of business judgment within the discretion of the directorate; no imputation of fraud in this connection can be justified; and the allowance was waived and discontinued by Mr. Noyes long before this controversy was precipitated.

The claim is made at page 176 of the appellee's brief that the dollar differential provided by the contract of November 19, 1913, is, like the methods of assaying in vogue at the time, "inherently wrong"; but since we have referred to this matter in our opening brief, we do not consider that any lengthy discussion is necessary here. Of course, the word "differential" is not used in the contract, the language of the contract being

> "from such gross value, the actual cost of mining and milling, less the sum of $1.00 per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of the party of the second part, shall be deducted and the difference shall constitute the net value of the ores so taken during that period by party of the second part from said Silver Hill Mine";

and this, be it remembered, is the same contract which the Klink Bean Company report described as being fair, and as being fairly carried out. In that report, no claim

is made of any impropriety, in the sense of fraud, in the matter of this $1.00, the authors of the report stating merely that "we are of the opinion that the reduction of cost of mining of $1.00 was hardly fair in the circumstances". This, however, is far from being a condemnation of this item as savoring of fraud; and if the appellee can point out any evidence that "the actual cost of mining and milling" was not fairly calculated and ascertained in the light of the situation known to the directors at the time when this contract was entered into, or that from the figure so ascertained any greater sum than $1.00 per ton has been at any time deducted, he will have avoided arithmetical speculation and will at least have confined himself to the case as presented.

But, as we have already suggested, in such matters as the method of bullion apportionment, the dollar differential, the tramway commutation and the salaries, it is always to be remembered that these were all matters within the fair scope of the discretion of the board of directors; and it must also be borne in mind that in appraising their exercise of that discretion, it should, we think, be remembered that mere proof of what they did cannot condemn them without the further proof that what they did was wrong, and wrong in the sense that it was fraudulently injurious to the company. This suggestion is, we venture to think, in line with the suggestions of Mr. Justice Harlan in *Jessup v. Ill. Cent. Ry.,* 43 Fed. 483, and those of this court in *Cowell v. McMillin,* 177 Fed. 25. It may, perhaps, not inappropriately be added that primitive law regarded the word and act only of the individual, but did not search his

heart. "The thought of man shall not be tried", said Brian, C. J., one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man" (Year Book, 7 Edw. IV, f. 2, p. 2); and as a consequence, primitive law was formal and unmoral. But this primitive law has been radically transformed; the primitive law asked simply whether the defendant did the physical act which damaged the plaintiff; the law of today inquires further, whether the act was blameworthy; and the ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.

COMPANY MANAGEMENT:

Criticism of the company management and of the constructive efforts of other men, especially if prompted by the selfish motives of those who failed to assist during times of stress, vanishes when all of the surrounding circumstances are adequately appraised.

Between pages 166 and the upper half of 168, a number of statements are made by the appellee, having to do more or less with the management of the company, which indicate marked misapprehension—to use no harsher term—of the contents of the record before us. For example, the statement is made that in January, 1913, "expenses began to pile up because of arrangements to operate Section 5"; but can it be possible that this appellee forgets that the record teems with evidence that the new constructions began in that month, and that the new cyanide plant began its operations in the following August, the old plant continuing work for a time while the new one was under construction? It seems scarcely necessary to argue that a reconstruction period always involves increased expense,

but the evidence here establishes no connecting link between the increased expense incident to the reconstruction of the plant, and the "arrangements to operate Section 5". In the same breath, referring to the profit of $23,379.33 from January to April, 1913, it is asserted that "this sum was nearly sufficient to pay for Section 5, had the company been allowed to do so". But, we submit, that, having in mind the general tenor of the appellee's brief, it is impossible to believe that he forgot the Osborn shortage, or the obligations created by the installation of the new cyanide plant; and this sum of $23,379.33, mentioned by the appellee, would certainly have had much more wonderfully expansive properties than even the widow's cruse of oil if it could have been made to pay the Osborn shortage of $10,689.75, the purchase price of Section 5, amounting in round numbers to $25,000, and the immediately due and payable obligations of the new cyanide plant amounting to about $40,000 (the remainder being deferred). And in this connection it may be added that it is generally considered among business men—a view in which the courts, as we have seen, coincide,—that the profits of a mining venture are neither so certain nor unfailing that obligations can be or are assumed in advance upon the strength of them. Again on page 167, the suggestion is made that if Section 5 "was a good purchase for Mr. Noyes, it was a good purchase for the company", and that "it would have been just as easy to have acquired the loans for the corporation", but as our references to such cases as *Lagarde v. Anniston Lime Co.*, 23 So. (Ala.) 199; and *Teller v. Tonopah Ry.*, 155 ~~id.~~ Fed

482, will show, assuming that if Section 5 were a good purchase for Mr. Noyes it was a good purchase for the company, that would be no reason why Mr. Noyes should have personally purchased that section for the company; and since the company had neither right, title, interest, estate or expectancy in the section, it had no equity to expect that Mr. Noyes should pledge his personal credit for its benefit. No doubt, it would have been, physically, quite easy for Mr. Cleveland to have put his name upon the company's note, but we apprehend that if Mr. Cleveland were asked to do that act, he would certainly have had something emphatic to say upon the subject, and his testimony leaves no doubt whatever as to what he would have said; and as to the Wells Fargo Nevada National Bank, that bank flatly refused to loan the company necessary moneys until the repayment thereof was guaranteed by the very same looters, wreckers and pillagers, who, appellee says, had no credit. And finally, before leaving this portion of appellee's brief, we call attention to the statement on page 168, that "in November, 1912, Noyes suddenly decided a cyanide plant was a necessity", and the only comment which we think it necessary to make upon this remarkable statement is this, that it is fortunate for these defendants that this court has before it a record which shows, upon the one side, a sincere and earnest effort upon the part of Mr. Noyes, running as far back as 1907, to benefit this company by the installation of a cyanide plant, and, upon the other side, a corresponding indifference, disregard, unwillingness and apathy upon the part of the stockholders, including the present appellee and the donor of his stock.

FALSE RECORDS AND CONCEALMENT:

Neither of these extravagant accusations is sustained by the record.

Much has been said in the course of appellee's brief upon these topics. Insofar as the alleged falsity of the corporate records is concerned, the principal cause of complaint appears to be, insofar as one may judge from pages 8, 123 and 158 of appellee's brief, that the recitals in the minutes do not concur with the three-year-old unassisted recollection of two uninterested dummy directors. We have gone over this matter in our opening brief fairly fully (320-328), and need not renew that discussion in this place. Plainly, even if we should assume any irregularity in these minutes, that irregularity had nothing whatever to do with the resolution of February 15, 1913, or the ultimate contract of November 19, 1913; and not only had that nothing to do with the lease of January 25, 1913, but Gardiner himself makes no pretense that any irregularity occurred affecting that lease and concedes that it was he himself who moved the adoption of the lease by the company. And since no showing has ever been made that the adoption of this lease operated any detriment whatever to this corporation, since the reverse was the case and the lease was grossly unfair to Mr. Noyes as the owner of Section 5, we are somewhat at a loss to understand why, assuming any collateral irregularity at all, time should be wasted in discussing the same.

In January, 1913, Mr. Noyes had not as yet acquired all of the stock of the Silver Hill Company, nor had he received as yet any deed to Section 5. On January 25,

1913, although the Osborn shortage had only just been discovered, yet Mr. Noyes had not as yet returned from Texas and had not as yet taken up that unpleasant subject with the principal stockholders in the company; in January, 1913, at the meeting in question, no occasion arose which then called for any statement either as to Mr. Noyes' efforts to obtain Section 5 (then well-known to the principal stockholders), or as to the Osborn shortage then only just discovered; and in January, 1913, no payments had as yet been made by Mr. Noyes upon any of the obligations which procured him the funds with which to purchase Section 5. It appears, moreover, that at this meeting, a loan of $15,000 for company purposes was authorized; it nowhere appears that this money was ever procured by the company; it nowhere appears that this money was ever procured by the company upon its own credit; it nowhere appears that if this money were obtained it was not used in the betterment of the company; and it nowhere appears that any alleged irregularity at the meeting affected this loan any more than it affected the lease of January 25, 1913. The claim of the appellee as to these pretended irregularities does not, in our opinion, arise to the dignity of a tempest in a tea pot.

There are remarks scattered through the appellee's brief upon the subject of what it pleases the appellee to describe as "concealment". It is difficult, we must confess, to extract from this brief a reasonably clear conception of precisely what is intended by appellee's remarks in this connection. For example, on page 14, the extravagant statement is made that "all annual re-

ports had concealed from the stockholders what the defendants now claim was the true condition of the company''; these reports, however, are contained in the volume of exhibits, and speak for themselves; and it would be, we think, very much more to the point if the appellee had taken the trouble to specify what particular subject-matter, relevant to the issues in this cause, had been concealed. And when the appellee, in the passage quoted, undertakes to speak about ''the stockholders'', it is perfectly obvious that what he has reference to is not the general body of the stockholders at all, not even the dummy co-complainant, Martin, who has never manifested the slightest interest in, or regard for, the affairs of the company, but the single individual who got his stock from a man who had ''lost confidence'' in the Presidio Mine, who desired to evade corporate liability, and who is not shown to have received a single penny for the stock which he unloaded upon others, and a single individual whose apathetic disregard for the company, its fortunes and its affairs, was so marked that he had even forgotten what stock ''our family owned''.

From the first disclosure of this record to the last, Overton aside, no voice whatever has been raised to claim any improper concealment by the defendants of any fact which the stockholders generally should have known. So far as the transfer of the Boyd stock from Osborn to Mr. Noyes is concerned, that, as we have already developed in our opening brief, was not a matter in which either the corporation or any of its stockholders, or the complainant here, had any legal inter-

est or concern; and if Mr. Noyes controlled Osborn through his antecedent knowledge of Osborn's defalcations—if, as this appellee declares, "Osborn was fearful of a disclosure of his crime" (brief, page 157),—it would plainly not have been necessary for Osborn to have made the transfer at all to Mr. Noyes, because, under these hypothetically assumed conditions, Mr. Osborn would have been in the hands of Mr. Noyes the same "pliant tool" that the appellee claims Miss Doherty to have been; and indeed, in passing, it may be observed that in the disordered imagination of this appellee, and for one reason or another, every human being with whom Mr. Noyes came into contact immediately lost his individuality, fell under the sinister control of Mr. Noyes and became his pliant chattel. Osborn was subservient to Mr. Noyes because "fearful of a disclosure of his crime"; no man could lend Mr. Noyes a dollar without being improperly influenced to do so; Mrs. Willis was misled; Miss Doherty was a pliant tool; and "E. M. Gleim, the superintendent, was at all times under the control of William S. Noyes" (191); and the very statement of these things, especially in view of the failures of Mr. Noyes to persuade these people to join any projects for the betterment of the company, sufficiently refutes them as the morbid imaginings of this solitary complainant. And so far as the acquisition of Section 5 is concerned, we submit that where a transaction of that kind is preceded by an effort on the part of the purchaser to have the company itself acquire the section; where upon failure of the principal stockholders to accede to a purchase by

the company, the purchaser openly declares his intention to acquire the section for himself; where the section is acquired in the most open and public manner; where dealings ensue between the company and the purchaser with reference to the section in which all concerned knew the purchaser as the real owner of the section in question; where after the purchase was made the owner offers the section to the company at its cost to him, but the company declines the offer because of financial inability; where the records and minutes of the company contain repeated references to the purchaser as the owner of the section; where the company's annual report tells the whole story to every stockholder; and where there is no proof that any stockholder actually did not know the circumstances themselves, no one can say, with the slightest degree of seriousness, that such a transaction, given such publicity, was concealed —to say that it was concealed is to twist and distort the English tongue out of its normal identity.

But at sundry places in the appellee's brief, reference is made to certain letters or telegrams; on page 137, it is declared that "all have been destroyed or removed"; on page 157, it is asked, "why necessary to destroy these telegrams?"; on page 160, after referring to an item of $22.05 for telegrams, it is asserted that "all these telegrams and all correspondence covering this period are destroyed"; and on page 215, reference is made to "the disappearance of all the telegrams and letters pertaining to the transactions had between William S. Noyes and this company, its officers, and his brother, in December, 1912, and January 1913". And

in connection with this last reference, the appellee refers to page 34 of the appendix to his brief, where a letter is found addressed by Constance Mills Overton to the president of the Presidio Mining Company, containing extracts from letters of Mr. Noyes and of Mr. Gleim, with marginal comments thereon by Mr. Noyes; these marginal comments speak for themselves; and no proof which we are able to recall was made in this cause to impeach the verity of any one of them. In some instances, the matters involved were purely private; in other instances, the letters were not kept because too old; in other instances, there was no copy; and Mr. Noyes' methods of handling his correspondence, and especially correspondence itself about three years old when this litigation was commenced, is fully described on pages 783-784 of the record. And in connection with this subject-matter, the appellee undertakes to formulate what he "believes" as to the contents of these telegrams; but what has his belief to do here? Is this case to be decided upon the actual facts proven in this record, or upon the beliefs of the parties litigant? Of what assistance is it to this court for one litigant dogmatically to assert a belief of his, and for the opposing litigant, with equal dogmatism, to assert a contrary belief of his? What canon of professional ethics justifies such a course as this?

No doubt, the imputation sought to be conveyed by these references to the destruction of these letters or telegrams is that in them was contained something sinister, though what that was no effort whatever was made to establish. The inquiry on page 157, "Why nec-

essary to destroy these telegrams?", sufficiently indicates this unfortunate mental attitude of morbid suspicion and of persistent antagonism to the precept that men are to be presumed honest rather than dishonest; and, as just remarked, the attitude was one of purely baseless suspicion, because no effort whatever was made to show that there was anything improper in the documents referred to. And upon the assumption that these documents were destroyed, we think that there is some difference between the case where a man, after the occasion has passed, does, as a matter of habitual system, destroy communications rather than have them accumulate and the case of a man who destroys a document to cover up some wrongdoing of which he has been guilty; and insofar as this record traces any documents to Mr. Noyes, he has explained fully and completely, and entirely without contradiction, his method and system in disposing of papers, declaring *inter alia,* that "my files would crowd me out of office, if I kept everything of that kind after matters were settled" (784). But where is the proof that the telegrams in question were "destroyed"? There was some slight evidence that they could not be found, but while a failure to find them might be chargeable as a piece of mismanagement against a clerk or secretary, it could scarcely be charged as against Mr. Noyes, who performed no functions of that character. There was, as we know, a telegram from Mr. Noyes in Texas to Mr. B. S. Noyes in California, and a reply from Mr. B. S. Noyes to his brother having to do with the Osborn shortage, and there was either a letter or a telegram from Mr. Noyes in Texas

to his brother in California requesting him to bring the lease of January 25, 1913, to the secretary's office, so that it might be executed; but at this time, Mr. B. S. Noyes was not an officer of the company, or connected with it in any way; and we do not believe that private communications between him and his brother had any place whatever in the company files; and even if they did, there was nothing whatever in these communications of a sinister character, or which operated any wrong or detriment to this complainant or the corporation. And moreover, and in addition to what has just been said, we find that the pages of the record referred to by the appellee in support of his statement that the telegrams were "destroyed" wholly fail, as usual, to support the statement which he makes. These telegrams appear to have first been inquired about when Mr. Peat was upon the witness stand. At that time, his attention was called to a bill dealing with twenty-two telegrams amounting to $22.05. The voucher was numbered 19 and dated February 12, 1913, and it referred to the twenty-two telegrams as of February, 1912, about a year previous, and included two other items (522). When the voucher was presented, the learned judge below, referring to the telegrams, asked, "What are they?" and in response to that, the appellee, through his solicitor, stated, "It does not specify what they are. They are telegrams that we claim were sent from Shafter, Texas, to W. S. Noyes and we will connect them up later."

With reference to this incident, we beg to observe that no explanation was made of the difference of one

year between the time when the telegrams are said to have passed and the date of the voucher; nor is any explanation made as to why Mr. Noyes who receipts for the $22.05 should pay for telegrams sent to himself; nor is it explained by whom these telegrams "were sent from Shafter, Texas, to W. S. Noyes"; nor is any explanation made as to what their contents were; and although the appellee declared that "we will connect them up later", yet, if by "connect up" some relationship between the contents of these telegrams and the issues in the cause be understood, this promise never was kept, and never was kept whatever meaning be attached to the phrase "connect up". And when the defendants' solicitor objected to these telegrams, the learned judge below allowed them to go in "subject to being connected up" and declared that if the connection were not made, they would be stricken out.

Thereafter, the witness Mr. Peat, then a witness for the complainant below, declared that

> "there are telegrams in the office, but I cannot say how far the dates of those telegrams go; there are some there. I will look and see and produce them for you to look over" (524).

Subsequently, Mr. Peat was recalled as a witness upon behalf of the complainants, and on that occasion, the following occurred:

> "I recollect that you asked me the other day if there were any telegrams in the office of the company relative to the purchase of Section 5, as having been received and sent relative to company matters in the month of December, 1912, and January, 1913; I have made a search of the records relative to this matter and these telegrams; I did not run across any such telegrams in the office.

Q. What is the earliest date, or rather the last date, since there are any telegrams of record in the office of the company?

A. I could not say as to the date. I have got a pile of them there.

Q. Did you not tell me it was 1914 or 1915?

A. 1915—there is quite a pile. I would not say there are none prior to 1915. None prior to 1914. I do not think there are any in 1914. I will say there are none prior to 1914 that I ran across.

Mr. Rose. That is all.

The Court. Do you rest?

Mr. Rose. We rest''. (649).

Here, it will be observed that the complainant rested his case; but up to this point in the development of the litigation, not only was this alleged ''destruction'' not established, but it was not even determined by whom the telegrams were sent or what their contents were, except that instead of being telegrams sent by Mr. Noyes, they were telegrams sent to Mr. Noyes. Being telegrams sent to Mr. Noyes, not only was no proof made of their contents, but no proof was made that they were actually received by Mr. Noyes, or that Mr. Noyes ever replied to them or confirmed or ratified them in any way, or acquiesced in the contents of any of them; and we understand the law to be that before a message sent to a person can be utilized in a controversy to which he is a party, there must be not only evidence that he actually received the message, but also proof of confirmation, ratification or acquiescence in its contents. The voucher introduced by the appellee, and above referred to, refers, according to appellee's explanation, to telegrams sent to Mr. Noyes, but no attempt was made to produce or to account for the ab-

sence of, any reply to those telegrams; and we understand the law to be that the omission to reply is no admission of the truth of any matters stated in the message, even in cases where the contents of the message are disclosed; and that a telegram unanswered or unacted upon is not admissible either as *res gestae* or as implied admission of its contents *(Jones, Evidence,* Section 269, page 336; *Packer vs. U. S.,* 106 Fed. 906; *Marshall vs. U. S.,* 197 id. 511). Of what significance, then, is this entire telegram incident?

But another page of the record is referred to by the appellee, namely, page 746, and when we turn to that page, we find nothing there justifying any claim of wilful destruction, with sinister purpose, of letters or other documents. The testimony there given was that of Mr. Noyes on cross-examination, and it is purely negative:

"Q. I direct your attention now to the time of your negotiating for this Section 5 in 1912 and January, 1913, particularly December of 1912 and January, 1913. You have no telegrams or letters or communications between yourself and your brother which were sent and received between yourself and your brother relative to this Section 5?

A. No, I have not.

Q. There are none in the corporation files, either?

A. No, sir.

Q. The only letter we have here is this so-called Willis letter that you wrote to Mrs. Willis and which has been introduced in evidence.

A. Yes.

The COURT. Q. Have you got the letter in which you sent the lease up to your brother?

A. No.

Q. With instructions?

A. No, I never keep personal letters.

Q. That related to a company matter.

A. No, I simply asked him to take that up to the secretary and go and get it executed, and I am not certain whether that was a letter or a telegram of this date. I merely asked him to act as a messenger to take that to the company's office'' (746-747).

So far as this matter of alleged destruction is concerned, the foregoing are all of the pages referred to by the appellee in support of his assertion; and we venture the suggestion that nothing therein contained establishes that assertion, and still less establishes any destruction of any document in any effort to cover up or conceal any fact whatever.

It is in this connection that on page 146 of his brief, the appellee, speaking of the acquisition of Section 5, observes that ''No large stockholder, other than these two, Osborn and Mrs. Willis were approached on the subject, but active concealment took the place of that frankness and openness required under the law touching these transactions''; but in view of the extent of the holdings of these two stockholders, one naturally inquires as to what other ''large stockholder'' there was with whom Mr. Noyes could confer? Certainly, it would have been idle for him to seek to communicate with Anson Mills, who had long before ''lost confidence'' in the Presidio Mine, and who had long before given away his stock under the dread of being compelled to respond to corporate liability. Equally fruitless would it have been for Mr. Noyes to have hunted up any of those to whom Mills had transferred his stock, assuming any of them to have been ''large stockholders'', and assuming further that any of them

had retained either confidence in the mine or interest in its affairs. And when the appellee speaks here of "active concealment", all that he means is that *he* was not notified in advance of Mr. Noyes' intention, after having failed to induce the principal stockholders to purchase Section 5, to purchase that section himself; and it is wholly irrational to suppose that the donee of the author of the Mills correspondence, who had never manifested any interest in the affairs of this company up to this time and who doubtless inherited Mills' attitude of lost confidence with the Mills' stock, would himself have succeeded where Mr. Noyes failed in inducing the company to purchase the section, or would himself have joined with Mr. Noyes in that purchase, or would have purchased the section in his own name.

We have heretofore fully discussed the perfect openness of Mr. Noyes' conduct in connection with the acquisition of this section, both before and after acquiring it, and we submit that this conduct was characterized in a most marked degree by the very openness and frankness which the appellee asserts was absent from it. But in the passage in question, the appellee speaks of "that frankness and openness required under the law touching these transactions"—touching what transactions?

The company never purchased Section 5, although urged to do so by Mr. Noyes; oppressed by adverse conditions, burdened with debt, and with a depleted treasury, the company was quite without financial ability to purchase the section, and said so; the company

had never deputed Mr. Noyes as its agent to purchase Section 5; the company continued, during the Winter of 1912-13, the same policy of disregard for Section 5 which had marked its course of conduct from 1897 to 1912; and in no way was the company a participant in the transaction of the acquisition of Section 5; on the contrary, that transaction was a transaction without the scope of the company's business, to which it was not a party, and which took place between Mr. Noyes, the individual, and the Silver Hill Company, the stranger. Under what obligation, to repeat an inquiry which we made in our opening brief, was Mr. Noyes to disclose to an absentee stockholder of the Presidio Mining Company, like this appellee, the details of his private transactions with strangers? What duty, legal, moral or otherwise, was he under to this absentee in this foreign transaction that he should consult the absentee? The transaction between Mr. Noyes and the Silver Hill Company was not one in which the absentee had any concern, or as to which Mr. Noyes owed any duty to him.

In line with the appellee's unsupported claims of concealment, he attempts, at page 169, to start a back-fire by charging the appellants with suppressing and substituting figures to support a point made in our opening brief at pages 88-89. It is to be observed that the subject under discussion by us at that page was "the financial resources of the company available toward the installation of this cyanide plant as of January 1, 1913"; and we there quoted the Klink, Bean and

Company schedule 15 as authority for the following table:

Nov. 30, 1912—Cash in bank	$ 8,380.91
Bullion in transit	10,605.03
Drafts (accidentally omitted)	450.00
Total (not printed)	$19,435.94
Less mine overdraft, unpaid invoices	11,612.44
Net	$ 7,823.50

Since, however, the appellee complains of substitution and suppression, we take the liberty of referring to Klink, Bean and Company's schedule 15, printed on page 19 of the Appendix to appellee's brief, and from that source we extract the following figures:

Assets stated by us as above	$19,435.94
Assets claimed to have been "suppressed" by us:	
1. Mill Supplies	19,314.71
2. Mine Supplies	1,079.41
3. Fuel Oil	2,060.52
4. Fuel: Wood	297.51
5. L. Osborn	10,689.75
Total Assets	$52,877.84

Bearing in mind, then, the topic which we were discussing at pages 88-89 of our brief, we think that the least that this appellee could have done was to have pointed out which of the so-called "suppressed" assets (which we have numbered above from 1 to 5) was

"available toward the installation of this cyanide plant"? We submit that it is grossly unreasonable to expect that the Presidio Mining Company could pay bills for machinery, skilled labor, unskilled labor, materials, etc., with either mill supplies, mine supplies, fuel oil, wood fuel, or a claim against L. Osborn for misappropriated money; but until this is made clear, we do not conceive that any further comment upon appellee's remarks is called for.

The case of *Strong v. Repide,* 213 U. S. 419, is readily distinguishable upon the facts from the cause at bar. In that case, there was affirmative and active concealment of material matters, while inducing the execution of a contract of sale. The defendant was a director in the corporation and owner of three-fourths of its entire capital stock, and he was also the administrator-general of the company. He was engaged in negotiations that finally led to the sale of the company's lands to the Philippine Islands Government at a price which greatly enhanced the value of the stock; and in purchasing the stock of the plaintiffs, he employed another person to make the purchase and concealed his own identity as the purchaser, and concealed his knowledge of the state of the negotiations with the Philippine Islands Government, and concealed their probable successful result; and the case was further complicated by a claim on the part of the plaintiff that the person who purported to act as her agent was not authorized to dispose of her stock. The court did not overlook the proposition that the ordinary relations between directors and shareholders were not fiduciary, but took the

ground that "yet there are cases where, by reason of the special facts, such attitude exists". The court then went into the facts and pointed out that really the defendant was acting as agent for the stockholders in the negotiations for the sale of the whole of the property of the company, and that therefore when he employed a third person to purchase the stock, and indulged in the acts of affirmative concealment which have been mentioned, he failed to live up to the duties of his agency, and violated his legal obligations. Upon the facts, we submit that there is no parallelism between that case and the cause at bar, where, as we have seen all of the acts of Mr. Noyes relative to Section 5, both before and after its acquisition, were the perfectly open, public and unconcealed acts of an individual treating with a stranger in his individual capacity, and not as agent for any other person or corporation.

LACHES:

> **No excuse is offered to explain the unpardonable laches of this appellee; on the contrary, he denies that he was guilty of laches; and than this, "there is no class of cases in which the doctrine of laches has been more relentlessly enforced" (Patterson v. Hewitt, 195 U. S. 309, 321).**

We have fully discussed this subject in our opening brief, and should not have again recurred to it if it had not been that in his brief the appellee makes a statement which, in our opinion, like many other statements in the brief, is at variance with the facts. At page 41, it is stated that the pleadings, which are verified by the appellee

"show that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs".

Although the plural "appellees" is here used, yet it is used entirely without authority, for the obvious reason that there is no proof in this record that in March, 1915, or at any other time, the nominal complainant Martin ever learned or became suspicious of any transactions whatever in the company's affairs; and consequently, this passage must be limited to the appellee, Overton, only. Again, it is asserted at the bottom of page 222 of the appellee's brief that "the discovery of irregularities" was made "on or about the first of April", which would be the first of April, 1915; and finally, on page 223 of the appellee's brief, it is stated that "in the instant suit it develops that Captain Overton first became suspicious about the first of April, 1915." Are these statements true? Is it the truth that Overton "first became suspicious about the first of April, 1915"?

We know that the annual report of 1913 was dated October 6, 1913, (Exhibit 17, book of exhibits page 26), and there is no denial that in due course of mail it was received by Overton. The only conclusion possible from the record before us is that between the time of the receipt of this exhibit by Overton in October, 1913, and the time when it was produced from his possession and put in evidence upon the trial below as complainant's Exhibit 17, the document remained in the possession of the complainant; certainly, there is not a syllable of evidence to show that during all that time it

ever escaped from his possession. After it was offered and received in evidence upon the trial below, the document passed into the possession of the clerk of the court below, in whose possession it has since remained, unless transmitted by him to this court; at all events, after this report was produced and received in evidence upon the trial below, it has remained in possession of a properly authorized officer of either the court below or this court. Not only is there in this record not the faintest trace of any alteration of this exhibit after it passed out of the possession of the appellee and into the possession of the proper governmental officer, but, since any alteration of this exhibit after it came into the possession of such governmental officer would have been a serious crime (Penal Laws, Sections 128, 129; 7 Fed. Stats. Ann. Second Ed., pp. 684-686), it follows that no presumption, even, can arise of any alteration of this exhibit after it left the possession of the appellee. In other words, this exhibit as it stands now in the book of exhibits provided for by the stipulation of the parties in this action (1201) is in the same condition in which it was when it left the possession of the appellee.

But, in the endeavor to escape the accusation of laches in this cause, this appellee takes the ground that he "first became suspicious about the first of April, 1915" (223), and that he had "full confidence in William S. Noyes up to the time of the discovery of irregularities on or about the first of April" (222); and he asserts that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs (41).

Bearing in mind that Exhibit No. 17, had undergone no change or alteration since it left the possession of this appellee, are these statements true? We think that they are not true, and that the appellee herein is convicted by his own handwriting of untruth in these particulars. It will be remembered that in the annual report of 1913, a statement is made concerning the acquisition of Section 5 by Mr. Noyes, and the arrangement which he made with the company as to its being worked on terms of a division of the net; and we direct the court's attention to the fact that upon the margin of this report (page 29 of Volume of Exhibits), and opposite the passage dealing with the acquisition of Section 5, just referred to, the following words appear in the handwriting of this appellee: "This looks bad to me". Of course, there is nothing upon the face of this report to show affirmatively when this notation was placed upon the report by the appellee; no proof upon the subject was tendered during the trial below; and it can only be by a consideration of what is usual among mankind that any inference can be drawn as to the specific date when the appellee made this notation. The Code of Evidence of the State of California, which translates into general statutory rules many of the doctrines of the general law of evidence, permits an inference to be founded on such a deduction from a fact logically proved as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature (Code Civil Procedure, Section 1960); and the

code also provides for sundry other presumptions which it declares are satisfactory if uncontradicted, among which may be mentioned the presumption that a person takes ordinary care of his own concerns, that higher evidence will be adverse from inferior being produced, that the ordinary course of business has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life (C. C. P., Section 1963, sub-div. 4, 5, 20, 28); and it is also provided by subdivisions 6 and 7 of Section 2061 of the same code that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. In this connection we submit that it should be borne in mind that this appellee understood perfectly well, as his amended bill shows (71), that the defense of laches would be interposed in this cause; and therefore he understood perfectly well that the point of time when his suspicions were first aroused, as he puts it, might become of importance. If his suspicions were aroused by the contents of the annual report of 1913, then, since that report had been continuously in his own possession since its receipt, he had it in his power to explain, if he could, just when this notation was placed upon the margin of the report; and since he has failed to make that explanation, we believe that the natural presumption would be that he

made the notation at the time when he originally received and read the report, such being the natural and ordinary course of things. Certainly the notation on this report will not be pretended to be in the handwriting of Mr. Noyes or any other person except this appellee; it is entirely obvious that the notation was placed upon the document after its issuance from the office of the Presidio Mining Company; and since the appellee produced that document from his own possession as his own exhibit, Section 1982 of the California Code of Evidence would call upon him to account for the alteration; and taking together all that appears from the record upon this topic, we think, and submit to the favorable consideration of this court, that, as appears from this notation, the suspicions of this appellee did not become aroused on April 1, 1915, but became aroused in October, 1913, when he received the annual report. And in any event, whether annotated by him then or not, that report was such notice to him of all the facts connected with the acquisition of Section 5, that it no longer lies upon his lips to claim that he had not in 1913, notice of facts sufficient to spur him into activity and diligence if he would avoid the defense of laches.

The circumstance that the appellee's suspicions were aroused, not on April 1, 1915, but upon receipt of the report in October, 1913, very naturally directs one's attention to the language of the report, declaring that "this company will work it (Section 5) on terms of a division of the net"; and the natural inquiry presents itself as to why this appellee did not act promptly when

his suspicions were aroused? Since he made the above-mentioned notation, and since his suspicions were aroused upon receipt of a report which made the announcement as to the future that the company "will work" Section 5 on terms of a division of the net, he had at least a month before him within which to verify or dissipate his suspicions; and if he had acted promptly upon receipt of the report, he would have had ample time within which to ventilate or remove any grievance that he may have suspected himself to have had, before the final contract of November 19, 1913, was executed; why, then, did he not exercise the prompt diligence called for by the law and demanded by his suspicions, instead of, as we have elsewhere said, rolling over to continue his sleep of the past five or six years?

FURTHER CRITICISMS UPON APPELLEE'S BRIEF:

> **Generally speaking, no man who has the least knowledge of the actual disclosures of this record, can possibly be convinced, though he may perhaps be bewildered, by the inept claims put forward by appellee, whose mind, as disclosed in these claims, suggests a deserted derelict, without rudder, compass or guiding hand, drifting aimlessly about in the uncharted sea of imagination.**

The brief before us would not be the brief of this appellee if it did not reiterate the appellee's claims as to Mr. Noyes' "domination" over this company, its officers and its stockholders; but we take the liberty of referring the court to what we have said upon that topic in our opening brief. That there is no foundation in the evidence for the claims of the appellee in this regard, is not surprising, because, as this brief indicates, the cir-

cumstance that a fact, or a series of facts, may be irreconcilable with a claim put forward by this appellee, is usually, in his opinion, his strongest reason for adhering to such claim. And it was in connection with this sweeping charge of "domination", and as instructed by *Cowell v. McMillin,* 177 Fed. 25, that we discussed the facts of the relationship between Mr. Noyes and Mrs. Willis, and we submit that those facts quite fail to exhibit any "domination" by Mr. Noyes of this lady.

At sundry places throughout the appellee's brief (pages 100-1; 105-6; 159; 182-4), the statement is made that Mr. Noyes made secret and concealed profits through contractual relations between the Presidio Mining Company and third persons; that statement is, however, without support in the record; and the evidence establishes that no profits were made by Mr. Noyes whatever in business wherein the company had contractual relations (730, 928). It is quite untrue, as asserted on page 105, for example, that Mr. Gleim paid Mr. Noyes monthly commissions for the business secured from the corporation employees, the fact being that the only moneys paid by Mr. Gleim to Mr. Noyes were in the nature of compensation for his services, not for securing business, but for collecting bills; and the uncontradicted evidence is that the employees of the Presidio Mining Company were free to trade with whom they pleased, and where they pleased. Indeed, the appellee's position involves two assumptions, at least, neither of which is maintainable. The first of these is that any compensation which Mr. Noyes may have received in the course of matters with which the company was dis-

connected was a secret or concealed profit; but this assumption is contradicted by the circumstance that nowhere in this record can be discerned any concealment or secrecy, or any effort at concealment or secrecy, in any of these transactions. And the second of these unmaintainable assumptions is that a corporation employee cannot engage in an outside enterprise in which no showing is made that the corporation is itself interested, but the reverse; and this topic has been fully discussed in our opening brief in this cause. Obviously, after having paid off its men, the Presidio Mining Company had no interest in how those men should dispose of the wages earned and paid to them, whether for board, groceries, clothing or what not; the only concern of the company was in paying its employees the wages due them; and with the subsequent movement of those wages, the company was not connected, and had nothing whatever to do.

In this connection, moreover, a brief reference may be made to page 182 of the appellee's brief, wherein it is asserted that after Mr. Noyes had stated that his business interests had ceased in the nineties, he changed his testimony, when confronted with his answer. This statement, in our opinion, is quite unwarranted by the testimony referred to; and an examination of pages 731 and 773 of the record will make it quite clear that Mr. Noyes was not professing to give specific dates, plainly stating on page 731 that "it was a good many years ago, and I really do not remember it"; and on page 773 saying, "I believe I said in the nineties; it was in the nineties, or the early part of the 1900—it is so long ago

I am unable to remember the exact dates." We submit that no such inference as the appellee would suggest may justly be drawn from these pages of the record referred to by him.

It is asserted at page 103 of the appellee's brief that "the corporation has never made a profit since the cyanide plant was installed"; but it is impossible, we think, to reconcile this extraordinary statement with the profit exhibited in the Klink, Bean and Company report, schedules 4, 6 and 8, at pages 996, 998 and 1000 of the record. This remark of the appellee is quite upon a par with his observation at page 168, relative to the "sudden" decision by Mr. Noyes that a cyanide plant was a necessity,—a remark which ignores Mr. Noyes' consistent attitude upon that subject since the early part of 1907, and likewise ignores the commanding fact that, because of the decline in ore values during the latter part of 1912, the high cost of reduction and conditions in the silver market, the time had at last come when what he had long wished to do would have to be done then, or not at all.

On pages 104 of the appellee's brief, certain figures are given relative to what is described as "finances"; and on page 119 of appellee's brief, the statement is made that the Presidio Mining Company, at the time of the acquisition of Section 5, "had $51,000 of liquid assets". Bearing in mind that what we are dealing with is the financial ability of the Presidio Mining Company to acquire Section 5, it will be observed that in the figures on page 104, the appellee actually includes in the "liquid assets" the claim against Osborn for

$10,689.75 misappropriated by him, and the item of $22,752.15 of "supply inventories", the whole aggregating $33,441.90; and the effort is to make it appear that, at this time, the company had sufficient liquid assets to enable it to acquire Section 5 for cash. Surely, no sane man would accept, in a cash transaction, payment by a claim for $10,689.75 against a broken reed like Osborn; and since the stockholders of the Silver Hill Mill and Mining Company had never developed Section 5, had never intended to develop it, and held it for speculative purposes only, it is plain that they would have no concern with a lot of mining supplies for which they had no use. To test the good faith of the appellee in this connection, we ask which of the so-called "assets", purported to be set forth on page 104 of the brief, could really be used to pay the purchase price of Section 5? We submit that the only items which, upon any theory whatever, could be available would be the cash in bank, $8380.91, and the bullion in transit amounting to $10,605.03, the whole aggregating $18,985.94, which amount would, of course, be reduced by the mine overdraft and unpaid invoices aggregating $11,612.44, thus leaving a net of only $7373.50. This "net" would not, however, be in the form of cash until the bullion in transit had been transported, refined and paid for, a procedure which requires fifteen days at least (908). Can it be believed, then, that the purchase price of Section 5, or of any mine, could be made by the remaining items in the list on page 104, namely, milling and mining supplies, and a more than doubtful claim against an individual for cash abstracted by him from the company treasury? And it may be added that, regardless

of all other considerations, when we contrast the figures on page 104 of the appellee's brief with the statement on page 119, that the company had "$51,000 of liquid assets", we cannot but regard the procedure of the appellee as wholly indefensible, and as raising no additional presumption in favor of one straining to convict another of a fraud.

At pages 105-6 of appellee's brief, and very likely at other places also, the commutation of the tramway contract is referred to, it being asserted at the place cited, for example, that Mr. Noyes bound the corporation to pay Messrs. Gregg and Gleim a profit of $9000 as a bonus on the loan; but the fact is, and it is plain from this record, that the directors authorized the commutation of the original contract (for building the tramway and operating it for one year) by the payment of the estimated profit; and as we argued in our opening brief, there is nothing in or about this commutation which differentiates it from any other ordinary business dealing within the scope of the discretionary powers of the directorate, or transmutes it into an act of fraud. There is, indeed, nothing legally or morally wrong with a commutation of a contract, and in the present instance, as the uncontradicted figures make clear, this commutation was beneficial to the company. Indeed, supplementing what we said in our opening brief, it may be added that commutation is as ancient as the break of the feudal system, when service was commuted for rents, and the peasants began to achieve their emancipation; instead of the mutual obligation of service and defense, the cash-nexus, as Carlyle called it, became the principal tie between the lord and his tenants.

At the bottom of page 107 of appellee's brief, the somewhat astounding assertion is made that "this responsibility (for Mr. Noyes' financial obligations) was assumed by the corporation". We are wholly unable, from our recollection of this record, to find any page thereof which authorizes this statement, notwithstanding our general knowledge of the case, an examination of the records of the company admitted in evidence, and a reconsideration of the testimony. Surely, so important a transaction as the assumption by a corporation of Noyes' financial obligations should be concreted in some sort of a visible form, at some particular time and in some specific manner; but an inquiry as to when, or where, or how, or on whose motion, or by what instrument this asserted assumption was consummated, is wholly fruitless,—no answer can be found to these inquiries, and we must dismiss this assertion as but another vagary of the disordered imagination of the appellee.

Recurrence is again made, on pages 135 and 145 of the appellee's brief, to the subject matter of company expenditures asserted to have been made in connection with traveling expenses and telegrams claimed to relate to the purchase of Section 5; and while this matter has been referred to heretofore, yet it can do no harm to remind the court that the testimony plainly establishes, and without the slightest contradiction, that the traveling here referred to was the trip which Mr. Noyes made to Texas to arrange for, organize and start the building of the company's cyanide plant, and that none of this money was expended in any arrangements relative to

Section 5. And so far as the $22.05 for telegrams is concerned, it may be observed that there never has been any evidence of the contents of these telegrams, or any reason to suppose that they involved anything but the ordinary business of the company or were in themselves anything more than ordinary monthly petty cash items. The evidence plainly establishes that no expense was incurred in the securing of the options of the stock of the Silver Hill Company, and there is no evidence whatever connecting the $22.05 for telegrams with the acquisition of Section 5.

It is stated on page 146 of the appellee's brief that "the price of silver in November and December, 1912, was higher than for many years"; but it is not to be inferred from this that the price of silver was high on other occasions. As the table which has been introduced in evidence will show, silver, like any other commodity, is not without its fluctuations; and in making the above quoted statement, the appellee omits to explain that following upon December, 1912, there was a long continued and acute depression in the price of silver. During the years 1913, 1914 and 1915, the decline in the price of silver below sixty cents caused a shrinkage of $136,948.47 in the company's income, as shown by the Klink, Bean and Company report (983-4); and the letter of Mr. B. S. Noyes to the complainant Overton, inserted in the appendix to appellee's brief at page 31, shows that the operating profit of the company for the years 1913 to 1915 was as follows: During 1915, the gain was $20,209.30; during 1914, that gain was $46,055.06; and the aggregate gain for these two years was $66,264.36.

But during the year 1913, there was a loss of $3543.71, a loss which was to be expected for the reason, if for no other, that this was the transition year between the old pan-amalgamation period and the new cyanidation; and this loss leaves the operating profit for these three years at $62,720.65.

The last paragraph of Mr. Noyes letter calls Overton's attention to the effect of that decline in silver, thus giving him the means of checking up the figures. It should be observed in this connection, that the letter in question deals with the company's fiscal years, not calendar years, and with operating profits which take no account of ore purchases, paid or unpaid, nor of depreciation and depletion entries. It is further to be observed that out of these earnings, the company had to pay for improvements, which cost, in round numbers, $80,000. When all of these circumstances are considered cumulatively, the extraordinary character of the appellee's series of statements concerning financial conditions, and particularly his statement that in 1914 the company for the first time had creditors, becomes sufficiently obvious.

What authority can be found for the acrobatic performance assumed in the middle paragraph of page 161 of appellee's brief, we are quite at a loss to determine; we know of no witness, document, fact or theory of fact to justify this piece of imagination. On the contrary, we do know that the testimony is particularly specific about the repayment into the company treasury by Osborn of the amount of his shortage as then known, the details being very fully set forth in the record. The

record shows actual deposits to the company's credit aggregating $10,689.75, and by no imaginative effort are we able to transform restitution into concealment. Also on the same page, and in the passage to the effect that

> "what should have been done was to have a tabulation made of the amount due on the shortage of Osborn and a charge on the company's books made against him, and payments made thereon to the extent of said indebtedness",

we are favored with the views of appellee, rather than a statement of the facts visible in the record; but one needs scarcely be an experienced business man to know that the instant such a condition becomes known to persons who are extending, or about to extend, credit to the company, such credit would have been instantly refused, the new cyanide plant would never have been installed, the company would have gone to the wall, Osborn necessarily would have gone to the wall with it, and there would have been no "payments made thereon to the extent of the indebtedness". Instead of pursuing such an insane course, ore of good grade was rushed from Section 5 to the company's mill, and payment well within the value of such ore was made to Mr. Noyes in a sum sufficient to enable him to make the loan to Osborn whereby the shortage was made good through the deposit of the identified checks to the credit of the company; and when all this was accomplished, the company had real, tangible, actual silver ore, or the produce of the bullion from that ore, instead of "a charge on the company's books" against an insolvent debtor, and the ruin of its plan through publicity given the fact that its cash was gone. To suggest a somewhat homely illustration of this point, let us suppose that the proprietor of a

fruit store has exposed a tray of oranges which he has bought and the cost of which has been entered in his books, and that the ubiquitous small boy steals an orange from the tray, is pursued, caught and compelled to restore it; should the shopkeeper thereupon go inside and make an entry on his books setting forth that theft and its restoration? The obvious answer is, "no".

On page 163 of the appellee's brief, reference is made to the voting trust which was organized in 1914, after the history with which we are concerned in this cause had already been made, although, with much discretion, the appellee omits to state the date when this voting trust was formed. Another striking feature of this reference to the voting trust is suggested by appellee's variable point of view with reference to Miss Doherty. For Miss Doherty, the appellee has nothing more than such compliments as "pliant tool" whenever she makes a statement which fails to harmonize with his theories; but whenever that lady states, not something which prospers his theory but which he imagines prospers that theory, then he is swift enough to refer to her and her testimony. This attitude may be illustrated by the declaration on page 59 of the appellee's brief to the effect that Miss Doherty was a lady without business experience who blindly followed Mr. Noyes' dictation, and a lady whom he refers to on page 118 as "the echo" and the "pliant tool in their hands"; and yet, when he desires to make an imperfectly stated point with reference to the voting trust it is to this very lady without business experience who blindly followed Mr. Noyes' dictation, this very echo and this very pliant

tool, that he resorts as his authority for his statement with reference to the voting trust. In the opening brief, we comment upon the formation of this voting trust, and cited the authorities supporting it; and we also discussed fully the circumstances under which the word "control" entered the testimony of Miss Doherty upon that subject. Further elaboration in this place seems unnecessary.

At the bottom of page 164, and the top of page 165, of appellee's brief, the following remarkable statement will be found:

> "Since September 23, 1915, when Osborn was deposed, Peat has been secretary with a salary of $250.00 part of which continually found its way into the Osborn family, according to an affidavit made by Peat and filed in the trial court".

We have no hesitation whatever in denouncing this statement as one wholly unjustified by anything contained in the record before us. The only affidavit by Mr. Peat before us will be found in Volume 2, pages 329-332 of the record; and in that affidavit, nothing can be found to support the statement contained in the appellee's brief. Although nothing contained in the appellee's brief required us to do so, nevertheless, we have re-examined the testimony of Mr. Peat for the purpose of ascertaining whether any support might be found therein for the above quoted statement by the appellee, but that search revealed nothing whatever to show that any portion of Mr. Peat's salary continually, or otherwise, found its way into the Osborn family. Of course, even if Mr. Peat, out of his salary, should choose to assist the family of a man whom he had known for many years, we should regard that as a kindly act on his part, but we should

not consider it as establishing any fraud on the part of Mr. Noyes, either in the transfer of the Osborn stock, or in the acquisition of Section 5. In a word, even if Mr. Peat assisted the Osborn family, that circumstance, however creditable to Mr. Peat, would not be relevant to any of the issues in this cause; but, of the fact itself as stated in the passage quoted in the appellee's brief, no part of this record furnishes any support.

On pages 169-170 of appellee's brief, the contention seems to be presented that during the first four months of 1913, the company was prosperous, but as pointed out by Klink, Bean & Company in their answer to defendant's suggestion No. 17 (985) the average value of the ore from Section 5 during 1913, was $18.57 per ton, declining in 1914 to $9.43, and in 1915 to $6.96. It should further be borne in mind in this connection that, as shown by Klink, Bean & Company's answer to defendant's suggestion No. 7 (982), the cost of operation in 1913, which was a year of transition and interrupted production, was $11.23, and in 1914, it was $8.07, and in 1915, it was $5.64; and it should not be overlooked that these costs include San Francisco expenses and royalty. In other words, all of the expenses of operation, *with Mr. Noyes' royalty added thereto,* were $8.07 in 1914, and $5.64 in 1915, as against an average cost of $9.51 from 1907 to 1912 (Klink Bean report, answer to defendant's suggestion 6) (982). Would not any business man, then, be rejoiced to be thus "defrauded", "plundered" and "pillaged"?

The whole claim of the appellee between pages 170 and 172 of his brief impresses us an insincere. Taking, for example, the declaration at the top of page 172 that

"Noyes' claim on August 28, 1916, would be approximately $78,000", and contrasting it with the testimony of Mr. B. S. Noyes at page 1061 of the record, it becomes entirely clear that in April and May, 1916, the company had two unusually good months, and that it was only if the rate of earning of that period of two months should have continued, that the claim of Mr. Noyes would amount to the sum claimed by the appellee in the question at the end of page 1060; but, as pointed out by the witness, this would be so only

> "if it kept on at the same rate, but the rates vary monthly * * * if the rate mentioned by Mr. Rose were maintained throughout the year, it would amount to about the figure he says, but the rate is not going on like that now, or anything like it" (1061).

And, it should be remembered that the table given on page 93 of our opening brief does not purport to be a statement of capital worth; if it did, the first item there mentioned "its $80,000 plant paid for", would necessarily have been added to the other items there stated making the aggregate $165,576.44, from which the deductions referred to upon appellee's brief on page 177 should be made; that is to say:

Total assets (exclusive of mine)		$165,576.41
Accrued operating expenses	$22,600.00	
(appellee's brief, 171)		
Credit to W. S. Noyes, January 1, 1916	49,000.00	
(Record 1060)		
Further royalties to July 1, 1916	23,000.00—	94,600.00
(Record 1060)		
Surplus (approximate)		$70,976.41

In other words, there was no deficit, and if the appellee had paid attention to the figures before him, he would have known it. It should be added that throughout page 172 of his brief, the appellee deals with cash only, and puts all other assets out of consideration, through which rather absurd procedure, he reaches the conclusion stated on page 173, that the company was bankrupt in August, 1916. But the figures which we have quoted can all be readily substantiated, or equally readily controverted if they are incorrect; and we believe that the attitude taken by the appellee in this connection, instead of supporting his clamor of fraud, resembles more closely a breach of the Ninth Commandment.

On page 178 of appellee's brief, *ad finem,* speaking of the computations made upon the bullion production from Section 5, it is declared that these computations "were made by him (Mr. Noyes) without check of any kind"; and we cannot help but regard this a most unfair statement. No proof is made anywhere that these computations were improperly made; and a sample bill from Mr. Noyes for one month's royalty, together with the sheets on which the calculations are made, is inserted in the transcript of record (at pages 946-7), and the court may there see with its own eyes that anyone who is so inclined can check all of the computations.

At pages 185 and 187, and, of course, at numerous other places throughout appellee's brief, references are made to the concealments of records, falsification of company books, and destruction of letters and documents; accusations of this kind, are inevitable in litigation of this character; and while the appellee does not

quite say so in so many words, yet he very plainly implies that these appellants have done these things; and he does say on page 185 that "appellants have continued to conceal information and destroyed records". We have heretofore very fully discussed this matter, and need not go into it again at large; but since the accusations here made are really accusations of crime (Cal. Penal Code, Section 573), and are not supported by the facts contained in the record, we feel that we have a right to protest against statements of this kind as being not only false but also slanderous. While it is stated on page 187 that in November, 1915, Mr. Gleim refused access to Overton to the books at the mine on orders from Mr. B. S. Noyes, still the appellee very carefully refrains from saying that Overton had already been given full access to those books in August, 1915 (915). In connection with this subject, we find, beginning at page 215, some further space given to it in appellee's brief; and in view of what is there said, the idea of the appellee seems to be that when the defendants below came into the directorate and found the company's treasury depleted they did not go abroad upon an excursion to discover non-resident stockholders, and to acquaint them with facts that those non-resident stockholders might well have ascertained for themselves. The claim that the records were falsified seems in substance to dwindle to the fact that no entries were made in the books when the money was deposited in the bank to make up the difference between the amount that should be there according to the cash book, and the amount that was actually there; but, as we have ex-

plained more than once, no such entry was necessary or even proper. So far as the entries concerning the $3500 transaction are concerned, the only relevant testimony upon that subject is that of Mr. B. S. Noyes, quoted in appellee's brief on page 197, in which it is explained that these entries were correct and in accordance with proper bookkeeping practice to record the facts as they happened; and it is to be observed that there is no testimony to the contrary whatever. It seems to be the attitude of this appellee that it is a positive crime to destroy any paper belonging to a corporation, no matter what its character or importance, but such does not appear to be the law. It is, indeed, a matter of common knowledge that in every business concern, more papers go into the waste basket than into the files of the company; the law of the State defines with accuracy what records of a corporation should be kept; and the Penal Code provides penalties for the destruction of such records with criminal intent. The appellee's whole course upon this subject has been a persistent effort to induce the belief in the mind of the court that essential and important documents were missing or had been destroyed; but the only particulars which he furnishes are a few unimportant letters, extracts from which appear on pages 35 to 38 of the appendix to his brief; and it is to be observed that these documents could not very well have been concealed from this appellee, or his wife would not have been able to reproduce extracts from them. It is also obvious from the extracts themselves that they were of no serious consequence whatever so far as the business of the corpora-

tion was concerned, and that the greater part of these letters were on file, as may be gathered from the appendix to the appellee's brief, page 34, where the appellee's wife writes that "there were copies of several letters in the office at Shafter in August, 1915, from which Captain Overton took extracts". And the appellee has, moreover, persistently sought to induce the belief in the mind of the court that he had been excluded from the office of the company at Shafter, and had not been permitted to see the company records there. But, by reference to pages 582-3 of the transcript of record, it will be seen that when the appellee visited the mine in March, 1915, the superintendent exhibited to him all sorts of records; "we went over that annual report together"; "I was present part of the time with Mr. Gleim alone in the company's office at Shafter"; "I went into the mill at that time"; and on page 916 appears a letter from the president to the superintendent advising the latter to give this appellee "access to the books, letters, maps, tables and records of the company as he may require". And while the appellee testified that he had been refused access to the Shafter records upon a later occasion, he very carefully suppressed the fact that they had been freely thrown open to him during August. On page 215 of the appellee's brief, reference is made to the disappearance of all telegrams and letters pertaining to transactions had between Mr. Noyes and the company, its officers, and his brother in December, 1912, and January, 1913; and in connection with that statement, a reference is made to page 34 of the appendix to the appellee's brief; but we are quite

unable to understand the pertinency of this reference, because it plainly appears upon the page cited that no mention is there made of any correspondence in December, 1912, and January, 1913; aside from indicating the appellee's misapprehension of the facts, we can perceive no purpose in the citation in question. It will, of course, be remembered that Mr. Noyes was in Texas continuously from about the middle of December, 1912, until the early part of the month of February, 1913; there is no testimony in this record that, during this period, there were any letters or telegrams between him and any officer of the company; nor is it reasonable to suppose that there would be any—there seems to be no occasion for any. The only testimony bearing upon that point is that there were one or two telegrams passing between Mr. Noyes and his brother Mr. B. S. Noyes who was not at that time in any way connected with the company, and it need hardly be said that such messages have no place in the company's files. It further appears that during January, Mr. Noyes wrote or telegraphed to his brother requesting him to deliver the lease of January, 1913, to Osborn, and to ask the latter to call a meeting and have the lease authorized. Here, too, it is obvious that the correspondence was nothing more than a mere request from Mr. Noyes to his brother to execute an errand for him. It therefore appears, the more one analyzes the situation, that the complaints of this appellee upon this general subject-matter are not only extremely unfair, but also involve a very complete misapprehension of the actual facts themselves.

On page 187, we find a recurrence to "an alleged defect in the amendment to the by-laws" thereby having reference to the date of the annual meeting of the company. It will be recalled that in this matter the directorate acted upon the advice of counsel; no claim is made, or argument presented, that the advice of counsel in this respect was bad law; and whether it was good law or bad law, the directorate acted in good faith upon it, and, as remarked in *Cowell v. McMillin,* 177 Fed. 25, 42, the suggestion that the course which the directorate pursued was in pursuance of legal advice, is a wholly reasonable one.

Beginning at page 187, we find comments made upon the testimony of the witnesses in the case, those for the appellee being treated as impossibly good, pure and unsullied, while those who were offered by the appellants were all bad and wicked,—a rather crude form of classification, we think. We do not see why it should be an offense on the part of Mr. Cleveland that he is a director in the Marfa National Bank which loaned $10,000 to Mr. Noyes; and we suggest that the very fact that Mr. Cleveland, who is apparently a man of substance, put his name upon Mr. Noyes' note for $10,000 (a fact treated with great delicacy by the appellee), would seem to indicate that Mr. Cleveland had faith in Mr. Noyes, and negatives not only the claim that Mr. Noyes had neither money nor credit, but also the claim that the company was flourishing, had a good credit, and was amply able to purchase Section 5. What purpose the appellee had in mind in referring to the increases in Mr. Gleim's salary, it is difficult to discover. It is to be ob-

served, however, that the appellee omits to state that the duties and responsibilities of Mr. Gleim increased, and that the work at the mine and mill and all the processes of production there, more than doubled. And it is further to be observed that it is not true that Mr. Gleim and Mr. Noyes together did the work which Mr. Noyes did alone at the mine, for the reason that, when Mr. Noyes was alone at the mine, there was not tne same amount or character of work to do. In referring to the testimony of Mr. Peat, the persistent blinking of the distinction between a mere bookkeeper and a secretary seems to be continued. And the only basis for the claim that Mr. Noyes had "ordered" the adoption of the lease of January 25, 1913, is that Mr. B. S. Noyes carried a message from his brother to Mr. Osborn asking him to call the Board together and take official action; and in this transaction, it is entirely plain that Mr. B. S. Noyes was acting as a messenger without any interest in the matter in hand. The reference to the orders to refuse Overton access to the books in Texas would have been fair and complete if it had called the attention of the court to the fact that Mr. B. S. Noyes had previously given Mr. Overton full access to all of the books and that Mr. Overton had enjoyed such access.

It would be impossible, within any reasonable limit of space and time to take up item by item the diatribe against Mr. William S. Noyes; but, directly or indirectly, most of the subjects of this diatribe have been heretofore treated, including such rash statements as that Mr. Noyes "acquired this corporation" (193), that "he

cancelled the lease" of January 25, 1913 (193), and the attempt to show a contradiction in Mr. Noyes' testimony because he stated that the resolution of February 15, 1913, approximated one-half of the expected net profits from Section 5, and also testified that he did not know the value of Section 5, it being only necessary to say in this last connection that the resolution mentioned did not imply a certainty of a total net of $90,000, because the condition therein contained made it quite certain that Mr. Noyes would never be paid $45,000 if the venture, which was hazardous and conjectural in the extreme, did not turn out well. Nor do we perceive any inconsistency in Mr. Noyes' testimony as claimed on page 194, that he had to buy Section 5, without an adequate examination, and yet that he made a careful examination of stope 13. We do not concede the accuracy of anything stated on page 194, if by the statement therein contained it be sought to imply that Mr. Noyes made a careful examination of stope 13; and we urge that the contrary is fairly to be gathered from his statement on page 749 of the record that

> "the only ore body that I examined in Section 5, before paying for it, or for the stock of Section 5, was that stope 13, *and that examination was necessarily confined to looking at these two drifts and the winze*".

But, even if we were to accept the declarations of the appellee's brief, it would still be true that the two statements are not in any way inconsistent, because even a careful examination of a limited area in a large mine would by no means give one full and complete knowledge of the value of the mine as a whole.

It is practically impossible to reduce to form and order the disjointed discussion, if it may be called such, contained in appellee's brief between pages 196 and 205, so as to enable one to know how much thereof is intended as a statement of what is supposed to be the facts which are supported by evidence, and how much is intended as argument. All that one can do is to make the best running commentary thereon practicable. It is not true that, as stated on page 196, the defendant below admitted concealing the Osborn shortage. It is true that testimony was given in the cause below that this shortage was repaid to the company by the actual deposit by Osborn of money loaned him by Mr. Noyes; and it is also true that for the $11,000 which was paid Mr. Noyes under the resolution of February 15, 1913, the equivalent in ore was delivered by Mr. Noyes to the company; and the net result of the transaction was that the company had in its possession real tangible visible ore instead of an uncollectible claim against a hopeless bankrupt. And that the company did not suffer by this transaction would be indicated by the insistence with which the appellee asserts that the company made a net profit of $23,000 from January to April, 1913—, a profit by the way which, as indicated by the Klink Bean Company report, came from Section 5 ores. The declaration that the defendants were forced to admit any of the matters referred to in the appellee's brief is wholly unfounded and unwarranted, their testimony being given freely and voluntarily. No evidence was produced in support of the assertion that the complainants below accused all of the defendants except Peat of par-

ticipating in the bonus; and we deny with equal emphasis the statement that an acknowledgment of the falsity of certain book entries was made by the defendants, and point out that the portion of the record quoted on page 197 of the appellee's brief to support that statement, does not give it any support whatever. On the contrary, the portion of the affidavit of Mr. B. S. Noyes there quoted is a straightforward account of precisely what entries were made and why they were made. The testimony of Mr. B. S. Noyes quoted on page 198 is not inconsistent with the transactions concerning the making good of a $3500 shortage as detailed on page 197; both sets of facts were and are true. The books were correct and in balance, and the shortage was made good. Just how or why the letter (382--4), a portion of which is printed on page 200 of appellee's brief, is in the slightest degree discreditable to its writers, is impossible to understand, it being quite obvious from the letter itself that the writers took Klink Bean's report for many of the facts which they state therein, and regarded the $1800 referred to therein as a further shortage; and the appellee himself furnishes in the next paragraph the complete explanation that the $1800 matter turned out to be a part of the $3500 which Mr. Noyes required Mr. Osborn to make good in September, 1913, as set forth in the quotation at pages 197-8 of appellee's brief. The copies of various entries inserted at page 201, are, owing to the limitations of print, not in the form in which they appear on the books, and are not in the chronological order, and can only confuse unless explained. The first in time is the entry of Sep-

tember 30, 1913, in cash book No. 1, page 100, "Sundry receipts, $3500"; and is a correct entry of the receipt of that amount. The next in order is the third entry shown on page 201, viz., Ledger No. 1, page 133, "sale of quicksilver, etc., September 30, 1913, $3500"; this is intended for a reproduction of a ledger page showing the posting of the item last above mentioned from the cash book into the ledger; it is erroneous in that the item is posted in the wrong account. The next in order is the second entry reproduced on page 201 of the brief, and should be in this form: "Sale of quicksilver, sundries, etc., $3500. To Profit and Loss, $3500". This is a correction entry to cancel from the ledger the item last above mentioned and place this item to the credit of profit and loss. The next in order is the last item shown on page 201, viz., Ledger No. 1, page 50; "Profit and Loss account, October 6, 1913, Sundries, sales, etc. $3500". This is intended as a reproduction as a ledger page headed "Profit and Loss", showing the posting of the second half of the item last above mentioned from the journal into the ledger to the credit of profit and loss. The ledger page which shows the posting of the first half of the item last referred to is not reproduced at page 201. It would show on the right, or credit, side, a posting from cash, September 30th of $3500; and on the opposite, or debit side, a posting from the journal, October 6, of $3500, the one balancing the other. This same explanation in connected words, but not graphically, is quoted on page 197 of the appellee's brief. But this entire portion of appellee's brief from page 196 to page 205 is based

upon a misconception of one of the most frequent transactions known to the business world, viz., the transfer of credits instead of cash. Every man does substantially the same thing when he pays a bill with his check. He transfers to his tailor or grocer a credit; the latter acknowledges payment but does not receive the sum; he deposits the check with his bank, which acknowledges the receipt of so much money, but it receives nothing but a credit; the bank sends the check to the Clearing House where it is delivered to the bank on which it is drawn; the latter bank acknowledges receipt of so much money, but it received no money, but a credit; it is then taken to the last mentioned bank, and that bank charges the drawer of the check so much money; but it has not paid him any money, any more than the Presidio Mining Company paid Mr. Noyes in cash $3500. In both cases the medium of trade was a credit. In other words, the giving of a receipt for $3500 by Mr. Noyes to the Presidio Mining Company, and the entry by Osborn of $3500 without the actual passing of the coin, is one of the most commonplace transactions in business, and the numerous pages of labored discussion on this subject in the appellee's brief, were but a waste of printer's ink. Had the $3500 in coin been placed in a sack, the same entries would have been made in the books, the sack of coin would have passed from Noyes to Osborn, from Osborn to the company, and from the company to Noyes, landing just where it started, and the appellee's criticism would have been obviated; and according to the appellee's theory such a journey of a sack of coin around such a circle would have made the transaction

innocent instead of wicked,—but business men do not do such idle things.

At page 212 of the appellee's brief, we find the complaint that it was unnecessary to have a general manager in San Francisco at $450 per month; and if the only usefulness of a general manager were to handle a pick, there was probably no such necessity. But if the functions of a supervising engineer are to supply brains, technical and scientific knowledge, and to lay out and install improvements, it can readily be seen and appreciated that an engineer can often give better service from a large city where he constantly meets and confers with men of his own profession, than if he is immured in a remote wilderness; and this appellee himself pays an unwitting tribute to Mr. Noyes' ability on page 210, in saying that on him alone depended the success or failure of the company. He has, in truth, made a conspicuous success in withdrawing this company from its calamitous condition and setting it upon the road to prosperity; and we do not think his reward for this should be a finding of fraud. While we are on this topic, it may be added that we do not understand how a corporation can well exist without a president; and as to the salary of Mr. B. S. Noyes, we do not believe that there is a mining company in the country doing a business of the magnitude of this company's business, and getting the results which this company is getting, which pays its president any less than $125 per month.

At page 228, appellee yields again to his unfortunate habit of indulging in rather chimerical hypotheses when he asks

> "what might prevent disposing of all the Osborn stock to third parties if not impounded (we suppose appellee means the stock, not the third parties) as the facts at the time of the granting of the injunction indicated they were about to do?"

But instead of disposing, or of attempting to dispose of the stock, no one is better aware than this appellee that the evidence shows that Mr. Noyes' holdings in stock increased largely after this action was begun, that over our objection it was shown during the trial that Mr. Noyes had bought one particular lot of 6800 shares, and that Mr. Noyes' holdings of stock, at the time of the injunction, were larger by several thousand shares than they were when the action was commenced; and as to this phase of the matter, we commend for appellee's study the observations of this court in *Cowell v. McMillin,* 177 Fed. 25, 38.

In the observations in the appellee's brief, upon pages 229 and following, concerning the condition of the company in January, 1918, a labored effort is made to make that condition appear different from what it actually was. At the bottom of page 230, the appellee quotes a passage from appellants' brief, and then on page 231 "contrasts" that quotation with "B. S. Noyes' sworn statement from which it was derived". But an attentive perusal of the objections of the defendant below to the appointment of a receiver (Record 3, pages 360 et seq.) will disclose that the statement of Mr. B. S. Noyes deals with the condition of the company as of January 24, 1918, and not of the date of January 28, 1918, when it was sworn to; that the table shown on page 362, purports to be neither more nor

less than a statement of the *net liquid assets* of the company as of that date; and that the table shown on page 365 purports to be something wholly different from that on page 362, viz., a table of the assets of all kinds, liquid or otherwise (excepting the mine),—there inserted to illustrate the assertions of the defendants below that they had added largely to the assets of the corporation during their administration. In other words, these two tables deal with different matters, were introduced in different connections, and there can, therefore, be no fairness in "contrasting" them. There is, indeed, no essential discrepancy between the two, because, as a matter of fact, they are the same, excepting that the permanent equipment is not included (as it should not have been) in the statement of net liquid assets appearing on page 362 of the record. Moreover, the appellee studiously avoids the obvious fact that, in the objections of the defendants below to the appointment of a receiver, the defendants' figures and arguments were based upon the assumption of Section 5 being finally adjudged to belong to the Presidio Mining Company; and on page 365, the defendants state very plainly that "on the assumption that Section 5 will finally be adjudged to be the property of the Presidio Mining Company, said corporation is free from all indebtedness"; and it is especially to be observed that the whole argument of the defendants was that the company was perfectly safe until final judgment, because the defendants had been restrained "from paying any money to William S. Noyes on account of Section 5" (364). It cannot, we think, be disputed that if Section 5 be finally adjudged to belong

to the Presidio Mining Company, then the figures furnished by the defendants below and shown on pages 362 and 365 of the record were absolutely correct, viz.:

total assets, January 25, 1918.....$349,286.27;
and total *liquid* assets January 25, 1918,... 192,249.99;
with no charge against those assets except the January expense (less, however, bullion in transit) and the income tax (whatever it might be), so that the liquid assets alone would be something over $117,449.99,
with permanent assets.....$157,036.28
additional. Therefore, upon the assumption that the decree of the District Court should be affirmed, there is no conceivable excuse for the appointment of a receiver.

The vice in the figures reproduced in the appellee's brief, pages 230 to 232, lies in the fact that they persist in dealing with the figures upon the assumption that Section 5 will be adjudged to be the property of Mr. Noyes, while they insistently demand a decree adjudging that section to be the property of the Presidio Mining Company; and also because the figures are garbled.

Turning to a consideration of those figures, we beg to point out that the table reproduced on page 231, and which appears in page 362 of the transcript, is a correct statement of the net liquid assets and the correctness of those figures has not been questioned. Proceeding to appellee's comments thereon, on page 231, we find that appellee wrongfully deducts $24,800 for January operating expenses and $50,000 for income tax.

The appellee well knows that $50,000 was merely an estimate and could not be anything else; that it was made on the theory that Section 5 belongs to the company; but that if Section 5 belongs to Noyes, the $110,000 estimated as his share of the one-half of the net profit from Section 5 due up to that time, is not a part of the earnings of the company and the income tax would be reduced to less than $25,000; that all the bullion for the month of January is not accounted for in the amount of $192,249.99 as "liquid assets", but that said sum would be increased by about one-third of the month's production of bullion. In other words, the figures stated at page 391 of appellants' brief, quoted in the appellee's brief at pages 230-1, do not include all bullion in transit; and even assuming the payment to W. S. Noyes of $110,000 as assumed by appellee on page 232 of his brief, the balance of the cash, bullion in transit and mining supplies there stated as $7,449.99, would be increased by about one-third of the month's production of bullion and by the difference between the estimated amount of income tax and that which was actually found due.

Moreover, the income tax was neither levied nor due and, as a matter of fact, there was more than ample time between the time when Mr. Noyes speaks and the time when this income tax would be levied and "become due", to earn several times the amount thereof, whether Section 5 belongs to W. S. Noyes or to the company.

We come back, therefore, to the fact that the total liquid assets at the time when B. S. Noyes speaks are, as stated by him, the sum of $192,249.99, exclusive of

about one-third of a month's production of bullion. The balance of $117,449.99, at the foot of page 231 of appellee's brief, is therefore increased by the amount of such bullion in transit. The culmination of appellee's attitude appears at page 232 of his brief, where he attempts to make a comparison of the "net worth" of the Presidio Mining Company's assets in December, 1912, with the "net worth" in January, 1918, and the offense consists in excluding from the "net worth" in January, 1918, all the permanent improvements belonging to the company.

After remedying this careful omission, the comparison would be about as follows:

Assets January 24, 1918		$349,286.27
Less amount assumed to be due		
Wm. S. Noyes	$110,000.	
January operating costs	24,800.	
Income tax, estimated	50,000.	184,800.00
Leaving a "net worth" of		$164,486.27
"Net worth" December 31, 1912,		48,212.11
(K. B. Schedule 15, Record p. 1008, Col. 2),		
Gain in assets in five years		$116,274.16

This result is arrived at by taking the worst possible view, so far as the appellants are concerned; and even so, it would seem that any reasonable man should be satisfied with an administration that makes an average gain of 15½% upon the capital stock (which is what the above named gain in assets figures out) for a five-year

period, the first three years of which presented about the worst possible conditions for successful operation that could well be imagined. But it is to be noted that the statement just made by us is grossly unfair to the appellants in the following particulars:

(1) The "net worth" December 31, 1912, stated by Klink, Bean & Company contains, as a part of the assets, an item of $10,689.75 due the company from L. Osborn. It is certainly not fair that in passing upon the appellants' accomplishments it should be assumed that on the date last mentioned that particular sum of money should be treated as an asset worth its face value; but, on the contrary, it should be stricken bodily from the assets going to make up the "net worth", and instead of having a "net worth" of $48,212.11, there actually was, on December 31, 1912, a "net worth" of $37,522.36.

(2) The item of $50,000 for income tax was not, in January, 1918, yet levied nor due and it was not payable until the following June. Therefore, although mentioned by defendants below in their opposition to the appointment of a receiver (Trans. pp. 362-3), it was there mentioned by way of forecast as an obligation that would later accrue and not as one then due. It hardly needs to be argued that an obligation which would not become due and payable until six months later should not be treated as a then existing debt, and this sum should be bodily stricken from the deductions, in order to fairly show the "net worth" in January, 1918.

(3) The January operating costs were, to a considerable extent, counterbalanced by bullion in transit and to come for the remainder of that month, but as there are no figures for this in the record, we will let it pass.

Hence, a statement of "net worth" as of January, 1918, eliminating the matters set forth above, is as follows:

Total assets January 24, 1918		$349,286.27
Less amount estimated to be due W. S. Noyes	$110,000.	
January operating costs	24,800.	134,800.00
"Net Worth"		$214,286.27
"Net Worth" December 31, 1912 (eliminating amount due from Osborn as an asset)		37,522.36
Increase in assets in five years		$178,963.91

which amounts to $35,392.00, or 23.58%, upon the company's capital stock, per annum.

Two facts stand out conspicuously as a result of this discussion:

(1) That these appellants who, during their administration, have increased the company's assets at the rate of 23.58%, on the company's capital stock, per annum, are charged with dissipating the assets; and

(2) That appellee has the assurance to ask this court to believe that a corporation whose income tax for 1917 is stated as $50,000 is a hopeless bankrupt (Brief, p. 230).

It may be observed in passing that the brief for appellee pays the defendants, unconsciously, a high compliment for their management, because it tells the court, by necessary implication, that the profit made by defendants during 1917, *was so large a sum that the income and excess profits tax thereon amount to a sum which equals 33⅓% of the capital stock.*

On the same page (232), it is stated that appellants "try to *leave the impresssion* that they have expended $157,036.28", etc. There is no effort to leave an impression; the amount was spent, the figures show on pages 368-9 of the record, and they cannot be questioned; the machinery is there and is doing the work, notwithstanding appellee's guess (p. 233) that one of the engines "has also probably worn out", of which there is no evidence whatever. This statement is followed by an effort to impress on this court the belief that the "oil engines in power house—$23,985.82" were one and the same with the engine installed in 1912. It is not the fact; there is no evidence of it; and neither of these engines has worn out, and there is no warrant whatever for any such pretense. On the contrary, appellee is well aware that the "oil engines in the power house,—$23,985.82" were installed at the mine (not the mill) and he refers on page 232 of his brief to the transcript pages 368-9, where the fact *plainly appears* from the figures 1917 followed by the word "mine" which immediately precedes the item of "oil engines in power house $23,985.82". The transcript, pp. 723-24, by reference to the annual report of 1912 (600) shows that the "brand new oil burning engine of 1912" was installed in the mill, not the mine.

In addition to the foregoing considerations, the deduction of any income tax whatever, in making a comparison with the condition of the company in December, 1912, with the condition in January, 1918, is manifestly unfair to the defendants, for the reason that, since the income and war profits tax to be paid for the year 1917, is an obligation which did not exist in 1912, it cannot fairly be treated as a matter of expense to be considered in determining the accomplishments of the defendants for that year, but is, in fact, a portion of the company's profits for that year which are contributed to the Government to help along the expenses of the war, instead of being distributed among the stockholders.

To put the matter in another form, war and excess profits taxes should be wholly eliminated from the expenses of the company so far as the affairs of the company are affected by anything done or left undone by the defendants. If the Government, as it would have a perfect right to do, should seize the company's entire profits for the year to help on the war, it could not be truthfully said that the managers of the company had not made a profit; but whatever the profits of that year may be, it is only common fairness to credit the defendants with the accumulation of that profit, whether the profit is distributed among the stockholders or whether the Government steps in at that point and seizes the same or any part thereof.

As in duty bound, we have endeavored to cover every point made by the complainants and have done our utmost to enlighten the court as to the facts in the case

and to assist the court in turning to the evidence and exhibits illustrating any point involved, yet we believe that two single pages in the transcript are sufficient in themselves to answer every criticism that has ever been made of the defendants and to give this court the most evident and striking picture of the problems that were presented to these defendants upon their accession to the directorate in January, 1913.

We refer to pages 984-5, which contain evidence furnished by Klink, Bean & Company, the employes of the court whose testimony must be accepted at its face value and is not subject to any suspicion, either as to its substance or its good faith. The situation confronting these defendants in January, 1913, as shown on those two pages, was this:

The ore of the Presidio Mining Company (Section 8) which had been declining in value for years (tabulation from defendants' Exhibit "NN" and plaintiff's Exhibit "19" appearing on page 104 of brief for appellants) and which for the company's fiscal year 1912 had averaged nineteen ounces of silver per ton of the value of $10.97 (table last quoted) declined steadily from that time on:

For the year 1913, the value per ton was $7.70;

For the year 1914, the value per ton was 4.55;

For the year 1915, the value per ton was 4.26; and on page 984 of the record, as well as page 982, Klink, Bean and Company state that the average cost from 1907 to 1912 was $9.23 at Shafter and a total cost of $9.51.

The stress of the matter in hand, therefore, lies in those undisputed facts, viz.: that the defendants below came into the management of a property having an almost uniform cost of $9.51 per ton with a yield for the first year of their management of $7.70, followed by a year of $4.55 values and that year followed by values which still further declined to $4.26. The task forced upon the Israelites by their Egyptian task-masters was child's play compared to the task that faced these defendants below. Bricks *can* be and are made without straw, but the business man has not yet appeared who can meet a $9.51 cost with an income of $7.70, $4.55, and, still less, with an income of $4.26. Such a situation would make any man ask at once, "How could they, and how did they, meet such a deplorable condition?" The evidence, taken collectively, shows that the defendants below met these conditions in the only possible way that they could be met; as defendants below could not infuse any more silver solution into the ore in the ground (and it is a wonder that the complainant has not found fault with them on that account), they did the only remaining thing; they cut the cost to below the sale value of the ore by the installation of the cyanide plant and its appurtenances. Can it be believed for a moment that their work was a sinecure? Can it be believed that such results were accomplished by merely grabbing their salaries as fast as they could get them, or by looting and pillaging the company? The common sense of the average man in the street would answer this question promptly by saying that no such result could have been obtained without diligent and conscientious effort continuously

applied to the problem until the problem was solved; and it is not to be forgotten that, amid all the ruck of fault-finding and quibbling over trivial sums and trivial questions, not once have the complainants suggested any concrete, definite course that the defendants might have pursued which would have resulted in any greater benefit to the company.

If we assume that from January to May, 1913, the company made profits from its mining operations in the sum of $24,000, and if we further assume that, instead of installing the new cyanide plant and its appurtenances, this sum of $24,000 had been expended in the purchase of Section 5, what would have happened? Taking the net value of the month's bullion covered from both mines as shown in column 12, of schedule 4 of the Klink Bean report, and dividing the same by the number of tons milled, we get the following results as to ton values:

August, 1913, $10.00; September, $11.67; October $10.51; November, $9.86, and December, $9.68; and if the new plant had not been installed, and the old mill had run continuously, these months would have been May, June, July, August and September. For the ensuing twelve months (schedule 6, column 12, divided by column 1), the average values had dropped to $6.60 per ton. During all this time, a consistent operating expense of $9.51 per ton would have prevailed; and this during that period would have entailed a loss of $2.91 per ton; and if the company had once started on this downward career nothing could have saved it.

In fact, for the year 1914, the value of this ore had dropped to $9.431 and in 1915 to $6.96 (Klink Bean & Company's schedules 6 and 8, column 14). If the installation of the cyanide plant had been postponed until 1914, when the ore values in Section 5 had dropped to $9.431, the situation would have been hopeless. During the installation of the cyanide plant, the operating cost at Shafter alone was $10.52 per ton (Klink Bean & Company Report, page 982); and we cannot assume that it would have been less in 1914, had an attempt then been made to install the cyanide plant. But it cannot be assumed that during all this time the mill would have been supplied with ore from Section 5 alone. Many of the tons of ore milled were taken from Section 8; and the average values of both mines were:

1913 (fiscal, ending August 31).....$10.97;
1914 (fiscal, 16 months) 7.50;
and 1915 (calendar year)..... 5.79
(Klink Bean & Co. report, p. 982 of Record.)

After a careful analysis of the figures, Klink Bean & Company say, in response to defendant's question No. 22, page 986, that the company might have survived for a time at least, even without the installation of the cyanide plant; but the mathematical demonstration is that it would not have lived beyond September, 1913. During 1913, 1914 and 1915, the company worked 116,202.9 tons of ore; and according to a calculation made by Klink Bean & Company (p. 3) the company would have made a loss of $249,058.39, if that ore had been reduced by the pan amalgamation process. In other words, if the directors, instead of installing the

new cyanide plant, had expended the above mentioned $24,000 in the purchase of Section 5, the company would, on September 1, 1913, have been without the new plant, and would have been making a loss of over $2 on every ton of ore put through the mill. All of this, we submit, goes to demonstrate that what the directors did was for the benefit of the company; and it must necessarily therefore be assumed that they acted honestly and in good faith.

THE SILENCES OF APPELLEE.

The appellee is silent where he should have spoken; no real analysis of the appellants' case is attempted by him; material relevant to a correct result is ignored; and these silences are vocal with significance.

Our opening brief sought to discuss the present cause in its various phases, and called specific attention to numerous features of the case; the matters referred to were all fundamental and they and their consequences were all relevant to the just resolution of the pending issues; but as to them, however, as well as to the considerations suggested by them, this appellee preserves a great, sweet silence.

The two outstanding features of this cause are the Osborn stock episode, and the acquisition of Section 5, —not that they are all of the features which present themselves in this record, but that they are very vital, the learned judge of the court below declaring the acquisition of Section 5 to be "the main matter for consideration in the case". In order to deal intelli-

gently with these features of the case, it became necessary to consider the real nature of the accusation here made, the general history of the events leading up to the making of this accusation, and the character and degree of the proof necessary to sustain it; and into these matters we went at some length; but when we turn to the appellee's brief to ascertain his views upon these topics, we are confronted with nothing which in the slightest degree impeaches the views expressed in our opening brief. We then took up the Osborn stock episode, analyzing the facts and collating the law relevant to those facts; but here, again, a resort to the appellee's brief brings nothing but disappointment to us, at least, for we are there unable to find anything approaching a systematically reasoned discussion of this topic. In our discussion of the acquisition of Section 5, we dealt with such topics as the freedom of a director to acquire real property in his own behalf, the absence of any duty upon a director to loan money to his corporation or purchase property for its use out of his private funds or by the exercise of his private credit, the characteristic conjecturalities of mining, the right of a corporate director to make a fair profit even in his dealings with his own company, the absence of secrecy in Mr. Noyes acquisition of Section 5, his offer of the Section to the company at cost, the futility of claiming that the vouchers for traveling expense establish that the company purchased Section 5, the financial inability of the Company to acquire that section, the utter failure of the complainant to establish that Section 5 was purchased with funds derived from the

Presidio Mining Company, the absence of any right, title, interest, estate and expectancy in the Presidio Mining Company in Section 5, the benefits to the Presidio Mining Company accruing from the acquisition of Section 5 by Mr. Noyes, and the absence of any trust of any character accruing to the company from the acquisition of Section 5 by Mr. Noyes; and we naturally looked for some rational discussion of these various propositions by this appellee—but we looked in vain. Up and down and throughout his brief we find scattered remarks, but nothing approaching a serious and consecutive discussion of these various propositions. We then went into the history of the company subsequent to January 31, 1913, when Mr. Noyes for the first time became a director of the company; we argued the proposition that that history not only exhibits a marked betterment in the company affairs, but also negatives any claim of control or domination by Mr. Noyes of the corporation; and here, too, instead of a systematic presentation, we find what cannot fairly be described as other than sporadic remarks here and there throughout the brief,—remarks quite without continuity or sequence. We then dealt with the question of ratification, with that of laches, and with the matters of injunction and receivership; and upon these matters, as well as upon the other matters mentioned, we find nothing which can be fairly described as of real assistance to a court confronted with the volume of business which is presented here.

Upon a full consideration, then, of this cause, with very great respect, we urge upon this court that the in-

terests of justice will be subserved by so disposing of the merits of this controversy that a decree of this court may be entered reversing the decree of the court below.

Dated, San Francisco,
April 2, 1919.

Respectfully submitted,
R. T. HARDING,
HENRY E. MONROE,
Solicitors for Appellants.

J. J. DUNNE,
Of Counsel.

Addendum.

We desire to correct an omission contained in our original brief at page 283, where we speak of a Colorado case, but through some oversight the case itself was not cited. We desire now to correct that lapse. The case in question is *Mackey v. Burns,* 64 Pac. (Colo.) 485.